IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1897.

THE CITY OF WALLA WALLA, ET AL., *Appellants*, vs. THE WALLA WALLA WATER COMPANY, *Respondent.*	No. 250.

Appeal from the Circuit Court of the United States for the District of Washington.

BRIEF OF JOHN H. MITCHELL ON PART OF RESPONDENT.

This is an appeal from a final decree of the Circuit Court of the United States for the District of Washington, enjoining "the City of Walla Walla and its several officers, appellants

herein, from proceeding further to erect water works in and for the City of Walla Walla as in and by a certain ordinance of such city is proposed; and from further acquiring any property for the purpose of carrying out the scheme of water works as in such ordinance proposed, and from further expending the moneys of such city in furthering and promoting said scheme of water works, and from negotiating or selling the bonds or other securities of the City of Walla Walla for the purpose of erecting, maintaining or operating water works, and from further denying the obligations of the City of Walla Walla under its contract with respondent to obtain its water supply from respondent at the price fixed in and by such contract, and from denying its obligations under such contract, and from building, maintaining or becoming interested in any system of water works other than that belonging to respondent."

(Record, 338.)

STATEMENT OF FACTS.

It is provided in Sections 11 and 12 of Article 2 of the act incorporating the City of Walla Walla, as follows: (Act November 28, 1883, Laws Territory of Washington. Record, 1):

"SEC. 11. The City of Walla Walla shall have power to erect and maintain water works

within or without the city limits, *or to authorize the erection of the same*, for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water, and for the purpose of maintaining and protecting the same from injury and the water from polution; its jurisdiction shall extend over the territory occupied by such works, and all reservoirs, streams, springs, trenches, pipes and drains used in and necessary for the construction, maintenance and operation of the same, and over the stream or source from which the water is taken for five miles above the point from which it is taken, and to enact all ordinances and regulations necessary to carry the power herein conferred into effect; but no water works shall be erected by the city until a majority of the voters, who shall be those only who are freeholders in the city or pay a property tax therein on not less than five hundred dollars worth of property, shall, at a general or special election, vote for the same. Such proposition shall be formulated and submitted not less than thirty days before election.

"SEC. 12. Said city is hereby authorized and empowered to condemn and appropriate so much private property as shall be necessary for the construction and operation of such water works, and shall have power to purchase or condemn water works already erected, or which may be erected, and may mortgage or hypothecate the same to secure to the persons from whom the

same may be purchased the payment of the purchase price thereof; said city shall have power to regulate and sell the water thus brought therein, and the moneys arising therefrom shall constitute a fund to be used to defray the expenses of operating the same and to pay the purchase price thereof; and said city may levy and collect a special tax each year until the necessity therefor ceases to exist, not to exceed two-tenths of one per centum. Provided, however, no such tax shall be levied or collected until the question has been submitted, as provided in section eleven (11) of this act, to electors as therein named, and a majority thereof at an election shall favor the same." (Record, 2).

It is averred in the complaint and admitted in the answer that on and prior to the fifteenth day of March, 1887, the respondent herein, who was the plaintiff in the court below, being then a corporation duly organized and existing under and by virtue of the laws of the State of Washington, was the owner of a water works plant, consisting of a water supply in the neighborhood of the City of Walla Walla, and all water mains, pipes, connections and fittings in place in the highways, streets and alleys of the City of Walla Walla, and connected with the said water supply, and was engaged in supplying the citizens and residents of the City of Walla Walla with water for compensation paid by said citizens and residents; but the said plant was considered by the

authorities of said city to be defective and insufficient to supply the City and its inhabitants with an amply supply of water; and it was deemed prudent and desirable by said authorities to contract with the plaintiff for an adequate supply of water for said city and inhabitants by means of additions and extensions to their plant, to be made by plaintiff at the expense of a large outlay of money. It is further averred in the complaint, and admitted by the answer, that the said City of Walla Walla was at that time indebeted in a sum exceeding $16,000, and that in and by Section 105 of Article 12 of its charter, it was forbidden to create an indebtedness of more than $50,000; and further, that its revenues, including the revenues which it was authorized by law to raise by taxation, did not and would not exceed its ordinary expenditures by more than $10,000 per annum; and further, that the cost of erecting any kind of water works for the said city, and of extending the same into the city, was more than $50,000, and that water works to adequately supply the said city, together with the necessary adjuncts and appurtenances, could not have been erected for less than $150,000. The answer, however, admits that the cost of erecting water works sufficient to supply said city would have been $50,000, but denies that it would have cost $150,000 to have erected works with the necessary adjuncts and appurtenances to adequately supply said city, or any greater sum that $75,-

000. (See complaint, Record, 3; answer, record, 22).

The complaint further states that the plant then owned and operated by the water company, respondent herein, had cost and was worth more than $50,000, and that the estimated cost of the additions, extensions and improvements to be made to its water works by the plaintiff in order to comply with the contract of plaintiff with defendants, was more than $100,000. The answer of the defendants denies this, and avers that the plant then owned and operated by plaintiff had not cost to exceed $25,000, and avers that the estimated cost of the additions, extensions and improvements to be made to plaintiff's water works did not exceed $25,000. (See complaint, Record, 3; answer, Record, 22).

The complaint further avers that "for the reasons hereinbefore stated, and by virtue of the authority vested in it by its charter hereinbefore quoted, the council of said city, on the fifteenth day of March, 1887, duly passed an ordinance entitled 'An Ordinance to Secure a Supply of Water for the City of Walla Walla.'" The ordinance is set out in *hæc verbæ* in the complaint. (See also Record, 3-5).

The complaint further avers such ordinance was duly approved by the mayor of said city on the nineteenth day of March, 1887, and was thereafter published as required by the charter of

said city within five days thereafter, to-wit: on the twenty-fifth day of March, 1887, and the same became and ever since has been in full force and effect as a valid ordinance. The answer admits the passage of this ordinance at the time and as stated, but denies that it was passed for the reason set forth in the bill of complaint or by virtue of any authority vested in said council by its charter, and avers that such ordinance was passed without any good or sufficient reason, and that said city had no power by its charter to adopt the same. The answer admits such ordinance was, on the nineteenth day of March, 1887, approved by the mayor of said city, and was thereafter published, but denies that it ever was in full force and effect as a valid ordinance of said city, and denies that the same had at any time any force or validity whatever; that the same was *ultra vires*. (See complaint, Record, 5-6; answer, Record, 22).

The bill of complaint further avers that pursuant to the terms of such ordinance, on May 9, 1887, the plaintiff, respondent herein, and the City of Walla Walla, appellant and respondent in the court below, duly and regularly made and entered into a contract in writing, which contract is set out in such complaint. (Record, 6-8).

The bill of complaint further avers said contract was duly made, entered into and signed by the clerk of the city, for and on behalf of the said

city as in and by such ordinance directed, and was recorded by the said clerk in full in the book of said city in which such ordinances are recorded, and ever since said ninth day of May, 1887, the said contract has been a valid and binding contract between the plaintiff and the said City of Walla Walla. (Record, 87).

The answer admits this contract was entered into pursuant to the terms of said ordinance as stated in the complaint, and that such contract was in the words and figures as set forth in complainant's bill of complaint. (Record, 22). The answer, however, makes the following averment in relation thereto:

"We deny that the same was duly or regularly made or entered into, and we deny that said contract has at any time been or is now or ever was a valid or binding contract between said complainant and the said City of Walla Walla, and allege that the same is *ultra vires* and invalid."

The answer further alleges as follows:

"That the terms of said contract was *(were)* not before the same was entered into, or at any time, or at all, submitted to a vote of the taxpayers of said city at a special election called by the city council therefor, nor was the same submitted to a vote of the taxpayers at any time or at all." (Record, 22-23).

The bill of complaint further avers that pursuant to said contract and in order to comply with its terms, the plaintiff has in all respects complied with its terms and met all the obligations of said contract. (Record, 8-9).

It is further averred in the bill of complaint that the population of the City of Walla Walla at the time of the making of such contract was about four thousand inhabitants; that the population at the time of filing such bill of complaint was about seven thousand five hundred inhabitants; that the revenues which can be derived from supplying water to consumers in said city will not be sufficient to support more than one system of water works, and are not sufficient to bring adequate returns even for one system of water works; that this fact was well known to plaintiff and to the mayor and council of said city at the time of the making of said contract. (Record, 9).

The bill of complaint further avers as follows:

"That the stipulation in said contract whereby the said city agreed not to erect, maintain or become interested in any water works, except the water works of the plaintiff, formed a material part of the consideration of said contract; that the plaintiff would not have made the large expenditures before stated for extending, improving, enlarging its system but for the said stipula-

tion; that for the said city now to engage as a competitor with plaintiff in supplying the city and its inhabitants with water, with the city treasury as a reserve to draw on for the purpose of supplying deficiencies of revenue, will amount to the practical annihilation of the value of plaintiff's plant and will cause it a loss of more than one hundred and fifty thousand dollars." (Record, 9-10).

The bill of complaint further avers that notwithstanding the making of the said contract as alleged, and the faithful observance of the same by plaintiff, the council of said city, on the twentieth day of June, 1893, passed, and on the same day the mayor of said city approved, an ordinance entitled, "An Ordinance to Provide for the Construction of a System of Water Works, to Specify and Adopt the Gravity System of Water Works, to Authorize the Purchase, Condemnation and Appropriation of Lands in the City of Walla Walla and the County of Walla Walla Necessary and Expedient for the Construction and Maintenance of said Water Works, and for a Right of Way; to Declare the Estimated Cost of said Water Works, Lands and Right of Way; to Provide for Borrowing Money to be used in Payment therefor by Issuing the Negotiable Coupon Bonds of said City for the sum of $160,000, and to Provide for the Calling of a Special Election for Submitting such Questions to the Qualified Voters of the City of Walla Walla for their Rati-

fication or Rejection." Which ordinance is set out in *hæc verbæ* in such complaint. (Record, 10-13).

The bill of complaint further avers:

"That an election was held in the said city on the twenty-seventh day of July, 1893, as in and by said ordinance provided, for the purposes therein stated, and it is now claimed and pretended by the said city and its said officers, including those made defendants herein, that the proposition submitted in and by said ordinance was carried by a majority sufficient to authorize the said city to erect and maintain a system of water works of its own, for the purpose of supplying itself and supplying consumers for compensation with water, and of contracting an indebtedness in the sum in said ordinance specified for said purpose, and the said city and its said officers, the defendants herein, claim and insist that its contract with this plaintiff is not a valid and binding contract, neither in respect to the stipulation binding the city not to erect, maintain or be interested in any system of water works other than those of plaintiff, nor in respect to the stipulation for the furnishing of water to the city by this plaintiff and the compensation to be paid therefor, and said city and said officers refuse to be bound by said contract or to observe the same, and said city and said officers, regardless of the rights of your orator under said contract, are proceeding to borrow money to erect

and maintain water works as in and by the ordinance last above set out and provided, and have advertised the municipal bonds of the said city to the amount of $160,000, for sale on the thirtieth day of January, 1894, for the purpose of erecting and maintaining said water works, and threaten to, and will, on said day, unless restrained by this honorable court, sell said bonds and apply the proceeds to the erection of water works for the supplying of the inhabitants and consumers of the city with water for reward and compensation, and will become a competitor with plaintiff for the trade or custom of said inhabitants or consumers, and said City of Walla Walla is now and for some time last past has been expending large sums of money for a water supply and for the improvement of the same, and for preliminary work in connection with its proposed system of water works, and is continuing to make said expenditures and will continue to do so, and threatens to and will commence the erection of said system of water works at a large expense if it shall sell its bonds for said purpose, and threatens to and will prosecute said work to a completion, and will become a competitor with the plaintiff for the trade and custom of the consumers of water in the City of Walla Walla as soon as said work shall have been completed." (Record, 13-14).

The bill of complaint further avers that the plaintiff in the court below, respondent herein, is

the owner of property in the City of Walla Walla of the value of $125,000, and that it pays taxes to the said city on the same; that there are more than two thousand other taxpayers in the City of Walla Walla, and that the taxable value of the property therein is more than $3,000,000; that the contract of the said city with plaintiff is an insuperable obstacle to its erecting and maintaining water works for the supply of its inhabitants with water; that if the said city is to borrow said money and apply the same to the erection of said water works, the same will be a loss to said city and its inhabitants; that the said indebtedness can be paid, and can only be paid, by the levy and collection of taxes from the taxpayers of the said city; but the said indebtedness will become a cloud and burden upon the taxpayers in the city, and that for the said city to borrow said money and apply it as threatened and proposed is inequitable, and imposes upon the taxpayers of the said city a large and unnecessary burden, and constitutes a diversion of the revenues of said city from its treasury to an unlawful and unnecessary purpose." (Record, 14).

The bill of complaint further avers:

"That the value of its property is largely dependent on the fact of its having no competition in the City of Walla Walla, and particularly no competition from the City of Walla Walla, and on the fact of its contract right to be free from com-

petition by the City of Walla Walla during the life of its contract; that it is necessary for the plaintiff in the prosecution of its business to borrow money from time to time and to extend its credit; that the illegal action of the said city and its said officers heretofore taken, as in this bill alleged, and the threatened action of the said city in borrowing money and proceeding to erect rival and competing water works, have greatly diminished the value of the plaintiff's said property and have diminished its credit, so that it finds itself without the ability to borrow money with which to make necessary additions and repairs to its said property and to maintain the same in condition to furnish an adequate supply of water to its customers, and that the value of its properties and the sources of its credit are being still further diminished the longer said illegal pretensions are indulged in, and that plaintiff will be irreparably damaged unless this honorable court interpose and by its injunction restrain said defendants from further prosecuting their said lawless and illegal purpose." (Record, 14).

It is further averred in the bill of complaint as follows:

"That by its system of water works it furnishes to the City of Walla Walla an adequate supply of water, and of sufficient pressure for all the needful and proper purposes of said city, and at all points in said City of Walla Walla where

the same is or may be needed, and that it furnishes to all the inhabitants of said city, at a reasonable rate, and at as low a rate as any maintained on the Pacific coast, whether by private companies or by municipalities, an ample supply of pure, wholesome water, and that its water mains are extensive and well distributed throughout the city, so as to reasonably supply the entire city; and your orator alleges that there is no necessity for an additional supply of water to be furnished by the city, and that the action of the said City of Walla Walla and of its officers in attempting to violate its contract with your orator, and in attempting to build competing water works in contempt of said contract and at large expense, is an oppressive and unjust exercise of power and one which should be restrained by a court of equity." (Record, 15).

Complaint further avers that the rights of respondent under said contract are of great value, to-wit: of the value of more than $50,000, and that the damage which will be inflicted on it if the said City of Walla Walla be allowed to repudiate its said contract and to carry out its present purpose of erecting and maintaining water works of its own, will be in excess of the sum of $50,000. (Record, 15).

Complaint further avers as follows:

"That the City of Walla Walla and its officers, including the defendants herein, threaten to,

and unless restrained by this honorable court will, on the thirtieth day of January, 1894, proceed to sell the negotiable bonds of the City of Walla Walla for the purpose of erecting the said water works, and will immediately commence the erection of the same." (Record, 15).

The bill of complaint concludes with a prayer for perpetual injunction. (Record, 15-16).

DEMURRER TO COMPLAINT.

To this complaint, appellant, respondent below, interposed a general demurrer. (Record, 18-19). This demurrer, after argument, was overruled by the court. (Record, 19-20).

ANSWER.

Defendants in the court below, appellants herein, in addition to denials hereinbefore referred to, make further denial that complainant complied with the terms of said contract or placed or maintained the necessary water mains or connections or fittings in the highways or streets or alleys of the City of Walla Walla, or that it has at any time extended the system of mains as fast as the popu-

lation and growth of said city warranted. It makes further general denials of compliance upon the part of respondent with the terms of their contract with the city. (Record, 23).

Answer makes further denials that the revenues which can be derived from supplying water to consumers in said city are not sufficient to support more than one system of water works, or that the same are not sufficient to bring adequate returns for more than one system of water works.

The answer further denies that the said stipulation in said contract whereby it agreed not to erect, maintain or become interested in any water works except the water works of the complainant, formed the material, or any part of the consideration of said contract, and denies that the complainant would not have made large expenditures but for said stipulation.

Answer further denies that the city to now engage as a competitor with the complainant in supplying the city and its inhabitants with water with the city treasury as a reserve to draw on for the purpose of supplying deficiencies of revenue, will amount to a practical annihilation, or any annihilation of the value of complainant's plant, or that the same will cause it a loss of more than $150,000, or a loss of any sum whatsoever; and such answer alleges that the proposed plant to be erected by said city will be more than selfsus-

taining, and that the operation of the same, instead of creating a deficiency, will produce a revenue for said city.

Answer further alleges that the present supply of water being furnished to the City of Walla Walla and the inhabitants thereof by the complainant, is entirely insufficient for domestic, sanitary or fire purposes; that the pressure is insufficient, so that in many parts of said city the water cannot be carried above the first stories of the buildings and the dwellings of the inhabitants, and that by reason thereof people dwelling in the second stories of such buildings are unable to obtain any supply of water whatever for domestic or sanitary purposes. (Record, 23-24).

The answer admits that the City of Walla Walla on the twentieth day of June, 1893, passed, and that on the same day the mayor of the City of Walla Walla approved, the ordinance set forth in complainant's bill of complaint, and that pursuant to such ordinance an election was held in said city on the twenty-seventh day of July, 1893, of which due notice was given. It admits that the proposition submitted in and by said ordinance was carried by a majority sufficient to authorize the said city to erect and maintain a system of water works of its own for the purpose of supplying the consumers with water, and for contracting an indebtedness in the sum specified

in said ordinance for said purpose. (Record, 24 and 25).

The answer further states as follows:

"We admit that the defendants herein claim and insist that defendant's alleged contract with complainant is not a valid and binding contract so far as concerns the stipulation binding the city not to erect or maintain or become interested in any system of water works other than those of complainant. We deny that said city or its officers have refused to be bound to said contract or to observe the same, except so far as concerns the stipulation that said city should not erect water works of its own." (Record, 25).

The answer further admits that appellant, respondent below, had already advertised the municipal bonds of said city to the amount of one hundred and sixty thousand dollars for sale on the thirtieth day of January, 1894, for the purpose of erecting and maintaining said water works, and that said city intends to sell said bonds and apply the proceeds to the erection of said water works for the supply of the inhabitants and consumers of said city with water for award and compensation.

It further admits that said city will become a competitor with the plaintiff for the trade and custom of said inhabitants and consumers. Admits that the said City of Walla Walla has ex-

pended the necessary sums of money for obtaining a water supply, and for preliminary work in connection with its proposed system of water works; that it intends, unless restrained by this honorable court, to continue to make such expenditures and to commence the erection of said system of water works if it shall sell its said bonds for such purpose; admits that it intends, unless restrained by said court, to prosecute said work to a completion, and for compensation to supply the consumers of water in the City of Walla Walla with water. Admits that the complainant is the owner of property in the City of Walla Walla. Denies that the same is of the value of one hundred and twenty-five thousand dollars, or any sum to exceed fifty thousand dollars, upon which said sum it pays taxes to said city. Admits that there are more than two thousand taxpayers in the City of Walla Walla, and that the taxable value of the property therein is more than three million dollars. (Record, 25).

The answer further denies that if the defendants are permitted to borrow money and apply the same to the erection of water works the same will be wholly lost, or lost at all, to the said city or its inhabitants; denies that said inhabitants will be paid, and can only be paid, by the levy and collection of taxes from the taxpayers of the city, and alleges that the greater portion, if not the whole thereof, can be paid by the revenues of the water works so to be erected. Denies that

said indebtedness will become a cloud or burden upon all or any of the taxable property in said city; denies that for the said city to borrow said money and apply it as proposed is inequitable, or that the same imposes upon the taxpayers of said city a large or unnecessary burden, or any burden whatever; denies that the same constitutes a diversion of the revenues of said city from its treasury to any unlawful or unnecessary purpose; denies that the value of property of complainant is wholly dependent on the fact of its having no competition in or from the City of Walla Walla; denies that by its alleged contract it had the right to be free from competition by the City of Walla Walla during the life of said alleged contract; denies that it is necessary for the complainant in the prosecution of its business to borrow money from time to time or at all to extend its credit. Denies that any illegal action of the said city or its officers heretofore taken or proposed to be taken in borrowing money and proceeding to erect water works has greatly diminished the value of complainant's property or its credit. Denies that the complainant will be in any way damaged by the proposed action of the city. (Record, 26).

Answer concludes as follows:

"We submit that the City of Walla Walla has the right, power and authority to erect said water works, and to furnish said city and the inhabit-

ants thereof with a supply of water as is contemplated and proposed by its ordinance hereinbefore mentioned; and we further submit that this court has no jurisdiction of the subject matter in this action, and that the restraining order heretofore awarded against these defendants should be dissolved and that complainant's said bill ought to be dismissed with costs." (Record, 27).

REPLY.

To this answer the complainant in the court below, respondent herein, interposed the following reply:

"This repliant, the Walla Walla Water Company, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and

sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed." (Record, 28).

TRIAL.

On these issues the cause came on for trial at Walla Walla, September 25, 1894, Hon. C. H. Hanford, United States District Judge, presiding. A great number of witnesses were examined both upon the part of the complainant and respondent. This testimony related mainly to the issue presented by the pleadings as to whether plaintiffs, respondents herein, had substantially complied with the terms of their contract with the city.

Without attempting to analyze this mass of testimony in this brief it is safe to say that it will clearly appear to the court from its examination that the complainant had in all respects substantially complied with all the terms and obligations as specified in such contract. (Record, 31-336).

And indeed it appears from the record that it was conceded on the argument of the case in the court below by counsel for respondent that such was the case. The court below in its opinion says:

"In their argument upon the hearing, counsel for the defendants have admitted that if the contract set forth in the bill of complaint is not unlawful, the case is within the jurisdiction of this court, and the complainant is entitled to the relief prayed for on the ground above specified." (Record, 343).

PLAINTIFFS IN ERROR CAN NOT IN THIS PROCEEDING BE PERMITTED TO INSIST THAT THE WATER COMPANY FAILED TO COMPLY WITH THEIR CONTRACT.

If there were any failure upon the part of the water company to comply substantially with their contract, then the city should have proceeded in the manner stipulated in the contract to ascertain and determine that fact. The provision as to how this contract should be avoided on account of any substantial failure upon the part of the water company to comply with its provisions, was as much a part of the contract as was any other provision in it (Record, 5), and a proceeding upon the part of the city in accordance with this provision, and the obtaining of a judgment of a court of competent jurisdiction, were indispensable conditions precedent to the right upon the part of the city to make any claim that there was any substantial, or other, failure upon the part of the water company. In other words,

the appellant, not having proceeded in avoiding the contract in the way it pointed out, are estopped from questioning it in this proceeding *for that reason.*

It is conceded the question as to whether the contract as a whole is *ultra vires* is an open one, and this the appellants may rightfully insist upon, but while this is so they are estopped, it is respectfully submitted, from setting up as a matter of defense in this suit that the water company has not complied with its provisions. If the contract as a whole is *ultra vires*, that settles it, and this case should be reversed. If it is such a contract, however, as the city has the power to make, then the appellants in error cannot be heard to say in *this proceeding* that there has been any failure upon the part of the water company to furnish an ample supply of water, inasmuch as it is a part of the contract itself that such question shall be determined in *another manner* before its obligation can be impaired by an ordinance of the city.

The provision in the contract is as follows:

"And this contract shall be voidable by the City of Walla Walla so far as it requires the payment of money, upon the judgment of a court of competent jurisdiction, whenever there shall be a substantial failure of such supply, or a substantial failure on the part of the said company to keep or perform any agreement or contract on

its part herein specified or in said contract contained; but accident or reasonable delay shall not be deemed such failure. And until such contract shall have been so avoided, the City of Walla Walla shall not erect, maintain or become interested in any water works, except the ones herein referred to, save as hereinafter specified."

But, again, while it is true no amount of ratification can make an *ultra vires* contract valid, yet if it shall be determined that this contract was not *ultra vires*, and conceding for the argument the right of the plaintiffs in error to raise the question as to failure to perform, then in such event the appellants are brought within the rule as to waiver and ratification.

So far as appears from the record this contract between the city and the water company and the full performance of all conditions by the water company were repeatedly and continuously recognized by both the city and water company from the date of the contract, May 9, 1887, until the passage of the ordinance providing for new water works by the city, June 20, 1893, a period of over six years; and during all this time no complaint on the part of the city was made, so far as the record shows, of any failure whatever upon the part of the water company, and no steps whatever were taken as provided in the contract itself for the purpose of having it avoided because

of any failure upon the part of the water company.

FINDINGS OF THE COURT.

It will be seen from the record that the court below found:

FIRST—"That the said plaintiff has at all times substantially complied with all the terms and conditions on its part in said contract agreed to be kept and performed, and that said contract has never been avoided by the City of Walla Walla, nor has any court of competent jurisdiction ever avoided the same, or decided or decreed that there had been a substantial or other failure on the part of the plaintiff to keep, maintain and furnish to the City of Walla Walla and its inhabitants an ample supply of good, wholesome water at reasonable rates, or a substantial failure on the part of the plaintiff to keep and perform the covenants and agreements on its part in the said contract specified." (Record, 337).

SECOND—"That the City of Walla Walla, and the other defendants, the officers of the said City of Walla Walla, are threatening to and are about to violate the said contract by erecting, building and operating water works belonging to the City of Walla Walla in opposition to those of the plaintiff, and by engaging as a competitor with

plaintiff in supplying the city and its inhabitants with water, and that said action will result in imparing the obligation of said contract, and constitutes a wrong remediable in this court by injunction." (Record, 337-338).

Based upon such findings the court directed a perpetual injunction to issue as prayed for and that the City of Walla Walla pay the costs and disbursements to be taxed. (Record, 338).

LEGAL POINTS.

FIRST.

Assuming, then, as we do, that the complainant in the court below complied substantially with all the obligations of the contract set out in the pleadings, the legal questions for the consideration of this court are these:

POINT I.

First—Do the writings set out in the bill of complaint, namely, the ordinance of the City of Walla Walla, passed the council March 15, 1887, and approved by the Mayor March 19, 1887, (Record 3-5), and the contract in writing made in pursuance thereof May 9, 1887, (Record, 6-8), constitute a valid and binding contract between the complainant, the Walla Walla Water Com-

pany and the City of Walla Walla, and is this contract protected by Section 10, Article 1, of the constitution of the United States?

Second—If they do, and assuming it to be true, and this is clearly apparent from the record, that such contract has never been avoided by the City of Walla Walla, that no court of competent jurisdiction has ever avoided the same, or decided or decreed that there has been a substantial, or other, failure on the part of complainant to keep, maintain and furnish to the City of Walla Walla, and its inhabitants, an ample supply of good, wholesome water at reasonable rates, then, is it true that appellants were threatening to, and were about to, violate the said contract by erecting, building and operating water works belonging to the City of Walla Walla, in opposition to those of the plaintiff, and by engaging as a competitor in supplying the said city and its inhabitants with water? And does the act upon the part of the city and its officers, appellants herein, in passing the ordinance approved March 19, 1887, and their proceedings thereunder, impair the obligation of such contract, and do such acts constitute a law and come within the inhibition of that clause of the national constitution (Section 10, Article 1) prohibiting a state from passing any law impairing the obligation of contracts?

Third—Had the circuit court jurisdiction to restrain the City of Walla Walla and its officers

by the process of injunction from further proceedings under such ordinance?

It is contended upon the part of appellants that the contract between the City of Walla Walla and respondents is invalid for two reasons:

First—it is contended that the power to construct and maintain water works conferred upon the city by its charter is a part of the legislative and governmental functions which cannot be abrogated by any act or contract of the city; and,

Second—that the contract to pay for supplying eth city with water for municipal purposes in quarterly installments, at the rate of $1,500 per annum for twenty-five years, created a debt, which, together with other existing indebtedness, amounted to a sum exceeding fifty thousand dollars, contrary to the one hundred and fifth section of the charter.

It is respectfully suggested neither of these contentions can be maintained.

Point II.

The City of Walla Walla had Full Power to Authorize Respondent to Construct and Maintain Water Works.

The power to construct and maintain water works for the use of the municipality of Walla Walla was not by its charter limited to the city

alone. The city, by section 11 of its act of incorporation (Record, 2), was not only clothed with power to erect and maintain water works within or without the city limits, but it was further n vested with power "*to authorize*" the erection and maintenance of such works for the purpose of supplying the city with water, and to grant for such purpose the right for a term not exceeding twenty-five years to use the streets of said city; while still a further and third power was granted, that of purchasing works which might be erected in pursuance of such authorization. (Section 11, City Charter, Record, 2).

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650-660.

The powers granted to erect and maintain water works, or to *authorize* the erection and maintenance of the same, are, it will be observed, in the *alternative.* Only one water supply for this city was clearly contemplated; that is, either one erected by the city, *or*, one erected by a person, association or corporation *authorized* by the city to do so, the right being reserved in the latter case to obtain ownership by condemnation and payment.

It is submitted, therefore, action under one power excludes action under the other.

Atlantic City Water Co. vs. Atlantic City, 37 N. J. Eq., 367.

The city, for prudential reasons—lack of funds, doubtless, as very clearly appears from the pleadings—did not choose to erect its own water works, but did "*authorize*" their erection and maintenance by the respondents.

GRANTS OF POWER IN CITY CHARTER.

In addition to the power granted the city in the two sections, 11 and 12, of the charter set out in the complaint (Record, 2), the said city was clothed with further specific power in Sections 3, 4, 7 and 10 of said city charter as follows: (Act Ty. Wash., approved Nov. 28, 1883):

"SEC. 3. The City of Walla Walla has power to assess, levy and collect taxes for general municipal purposes not to exceed one-half per centum per annum upon all property, both real and personal, within the city, which is by law taxable for territorial and county purposes, and to levy and collect special taxes as hereinafter provided; but all taxes for general and special municipal purposes shall not exceed in any year one and one-half per centum on the property assessed, provided, however, that the above limitations shall not apply to local assessments for assessment districts.

"SEC. 4. The City of Walla Walla shall have power to make regulations for the prevention of accidents by fire, to organize and establish fire

departments, and shall have control thereof and ordain rules for the government of the same; to provide fire engines and other apparatus *and a sufficient supply of water*, and to levy and collect special taxes for these purposes not to exceed in any year three-tenths of one per centum upon the taxable property within the city.

* * * * *

"SEC. 7. The City of Walla Walla has power to provide for the lighting of streets and furnishing the city with lights, and for the erection or construction of such works as may be necessary and convenient therefor, and has power to levy and collect for these objects a special tax not exceeding one-fifth of one per centum per annum upon the taxable property within the limits of the city for the benefit of such lights.

* * * * *

"SEC. 10. The City of Walla Walla is hereby authorized to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light *or water*, to any persons or associations of persons *for a term not exceeding twenty-five years.*"

In *New Orleans Gas Company vs. Louisiana Light Company, supra*, Mr. Justice Harlan says:

"Municipal corporations constitute a part of the civil government of the state, and their streets

are highways, which it is the province of government by appropriate means to render safe. To that end, the lighting of streets is a matter of which the public may assume control. * * * Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit of business open as of common right to all upon terms of equality; for the right to dig up streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the state or by the municipal government of that city acting under legislative authority; (Dillon's Municipal Corp., 3d Ed., Sec. 691; *State vs. Cincinnati Gas Co.*, 18 Ohio St., 262. See also *Boston vs. Richardson*, 13 Allen, 146). To the same effect is the decision of the Supreme Court of Louisiana in *Crescent City Gas Light Company vs. New Orleans Gas Light Company*, 27 La. Ann., 138, 147, in which it was said: 'The right to operate gas works and to illuminate a city is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets and lay down gas pipes, erect lamp posts, and carry on the business of lighting the streets and houses of the City of New Orleans without special authority from the sovereign. It is a franchise belonging to the state, and in the exercise of the police power the state could carry on the busi-

ness itself or select one of several agents to so do.'"

In pursuance of this charter, and clearly within the scope of the power granted, the City of Walla Walla, by its ordinance passed the council March 15, 1887, and approved by the mayor March 19, 1887, (Record, 3-5), and by its agreement in writing with respondent in pursuance thereof of date May 9, 1887, (Record, 6-8), contracted and agreed with respondent as follows:

The Contract.

First—That the complainant was authorized to lay and maintain all necessary water mains, pipe, connections and fittings, in all the highways, streets and alleys, for conducting water in the streets of the city, and to supply the city and its inhabitants with water, the complainant obligating itself to do so and to supply water for the use of the city in extinguishing fires, flushing sewers and all other municipal purposes, for a period of twenty-five years, and in consideration thereof the City of Walla Walla obligated itself to pay to said Walla Walla Water Company, complainant, quarter yearly, on the first days of July, October, January and April of each year, at the rate of $1,500 per annum, for said period of twenty-five years, from and after the date of such contract, the first quarterly payment to be made on the first day of October, 1887.

Second—That during such period of twenty-five years, unless, and until such contract had been avoided by a court of competent jurisdiction for a substantial failure to furnish the supply of water as provided for in said contract, or a substantial failure on the part of the respondent to keep or perform its contract obligations, it, the City of Walla Walla, would "*not erect, maintain or become interested in any water works*" except the one provided for in such contract, save and except by "*condemning and paying for the water rights and works*" of respondent. (Record, 3-8).

Point III.

This ordinance and writing are in specific terms a "*contract.*" This contract, moreover, is one so clearly and plainly expressed that misinterpertation is quite impossible. It is not open to construction—it interprets itself. From its provisions it is clear that the company's works were the exclusive source of water supply contemplated by the contracting parties, unless, in the event of a substantial failure upon the part of the company to comply with its provisions, and the avoiding of the contract by a court of competent jurisdiction for such purpose, *or* in the event of condemnation of the company's works and payment to the company of their value by the city.

It is stipulated in the contract, it will be observed, among other things, that the water company shall extend their system of mains as fast as the population and growth of the town shall reasonably warrant (Record, 47), and so as "to give pressure from the reservoir of the greatest elevation in the time of fires" (Record, 4); and further, "in case of fires the city, through its officers and employes, shall have all reasonable and necessary control of the water company's water mains and reservoirs for the extinguishment thereof," and "for the purpose of drilling fire companies shall use such water as may be necessary therefor, * * * and shall also use such water as may be necessary and convenient in its engine houses and other city buildings, and to supply any and all city fire cisterns (Record, 4); and further, that the city shall, during the twenty-five years existence of such contract, without expense for water, be allowed to flush any sewer or sewers it may hereafter construct, at such time during the day or night as the water company may determine, and under the direction and supervision of such officers as the city may from time to time designate, not oftener than once each week." (Record, 4).

It is further stipulated in this contract as follows:

"That for all the purposes above enumerated, said Walla Walla Water Company will furnish

an ample supply of water for domestic purposes, including sprinkling lawns, and an ample supply of good, wholesome water, at reasonable rates, to consumers at all times during the said period of twenty-five years." (Record, 4-5).

Did any doubt remain from the provisions just quoted that it was clearly the intention of the contracting parties that the city should not become a competitor with the water company in supplying the city and its inhabitants with water, that doubt is entirely removed by the further provisions of the contract wherein it is stipulated as follows:

"*This contract shall be voidable by the City of Walla Walla, so far as it requires the payment of money, upon the judgment of a court of competent jurisdiction, whenever there shall be a substantial failure of such supply, or a substantial failure on the part of the water company to keep or perform any agreement or contract on its part herein specified or this contract herein contained.*" (Record, 5).

Then follows the specific agreement to the effect that the city should not become such competitor, in the following words:

"*And until such contract shall have been so avoided, the City of Walla Walla shall not erect, maintain or become interested in any water works, except the ones herein referred to, save as hereinafter specified.*" (Record, 5).

What is the exception specification that followed? It is simply one providing *in terms* for the condemnation of the water company's works, and payment of their value by the city, and reads as follows:

"Neither the existence of this contract nor the passage of ordinance number 270, shall be construed to be, or be, a waiver or relinquishment of any rights of the city to take, condemn and pay for the water rights and works of said company, or any company, at any time, and in case of such condemnation, the existence of this contract shall not be taken into consideration in estimating or determining the value of the said water works of the said Walla Walla Water Company." (Record, 8).

Aside, however, from the *express stipulation* in the contract that the city would not enter into competition with the water company, the city is estopped from doing so. It is a rule equally good in law and in morals that where one party to a contract has the power to impair its obligation by doing a certain other act, such party must be held by the act of making the contract to have impliedly agreed to refrain from doing such act of impairment. The City of Walla Walla, therefore, having contracted with the water company, respondent herein, to furnish a supply of water for all the purposes of the city and its inhabitants, has the power to impair the obligation of such

contract and render it absolutely worthless, because no company can compete with the city by erecting water works of its own. Therefore, in equity and good morals it must be said the city by solemnly entering into such contract agreed impliedly not to erect works of its own to be operated in competition.

Point IV.

The Contract is not Prejudicial, Either to the Public Health, or the Public Saeety.

It cannot be successfully contended that this contract with the water company was in any sense prejudicial, either to the public health or to the public safety, inasmuch as the city is not only not deprived or prevented from exercising any control over the matter of supplying the city with water, but by the further terms of the contract itself such right is for all purposes of the public health and the public safety *expressly reserved to the city.*

For instance, it is provided in the contract that all water mains, pipes, connections and fittings shall "be placed far enough under ground to constitute as little obstruction as practicable, and in such a manner as to do the least possible damage to the streets, and not more than twenty-five feet from the boundary line of the streets, and in all cases where ditches for such purposes

shall be dug in the streets, the same shall be left as near as possible in the same condition as before, and the ground removed in digging such ditches shall be well and firmly packed and tamped while being replaced." (Record, 7).

Adding still further, the contract provides as follows:

"That the said water company will hereafter lay all their mains of sufficent size to carry fire hydrants, and they will erect one stand pipe on each side of Mill creek at or below Sixth street so as to equalize and make available the pressure of the water in their reservoir as now constructed, and will extend their system of mains as fast as the population and growth of the town shall reasonably warrant. Mains on the north and south side of Mill street will be connected so as to give pressure from the reservoir of the greatest elevation in time of fire; the main on First street will be connected with the Sixth street main by mains through each alternate street from Birch to Main inclusive."

And still further the contract makes the following reservation to the city:

"The City of Walla Walla shall have the right to erect in a proper and workmanlike manner and maintain at its own expense, in such manner as to prevent leakage, as many fire hy-

drants on the mains of the water company as it shall see fit, not exceeding one (1) at each street intersection, and *in case of fire the city, through its officers and employes, shall have all reasonable and necessary control of the water company's water, mains and reservoir for the extinguishment thereof; and for the purpose of drilling fire companies may use such water as may be necessary therefor, not oftener than once in two weeks for each fire company, and the city may also use such water as may be necessary and convenient in and about its engine houses and other city buildings, and to supply any and all city fire cisterns.*" (Contract, Record, 7).

These several provisions, it will be seen, cover every point necessary to the protection of the public safety, the public convenience and the public health, and for the purpose of reaching every want of the city and its inhabitants in respect of a water supply for municipal purposes, and insofar as they are interested in an ample supply of good, wholesome water for every purpose connected with the wants of the city and its people, and which supply must furthermore be, by the *express terms* of the contract, furnished by the water company to the consumers "*at reasonable rates*," at all times during said period of twenty-five years. (Contract, Record, 7).

The city can, therefore, exercise all necessary control over this contract, and over the water company, in order to secure the performance of

all these various stipulations without in any manner impairing the obligation of the contract; besides, a substantial failure on the part of the water company to perform any of these conditions, authorizes the city, not on its own motion by its own legislative action, but *through a court of competent jurisdiction, to avoid the contract.* (Record, 7-8).

Point V.

The City of Walla Walla, by its ordinance and agreement, agreed that for the period of twenty-five years it would not compete with the company, but that if during that time it wished to own its own water works it would buy those of the company at a price to be fixed by arbitration.

This the city had ample specific power to do, not only in virtue of Section 11 city charter, as incorporated in the complaint (Record, 2), but also by the specific provision in Section 10 of such charter (Act approved November 28, 1883) which reads as follows:

"The City of Walla Walla is hereby authorized to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light *or water,* to any persons or associations *for a term not exceeding twenty-five years.*

Point VI.

The Stipulation that the City Would Not Become a Competitor a Reasonable One.

A provision that the city shall not maintain water works of its own for twenty-five years, unless by purchase of the company's works at a price fixed by arbitration, is not an unreasonable one and is therefore authorized. The city, under the general authority to authorize the construction of water works, especially, as in this case, when there is specific authority to make a contract for a period of twenty-five years, is authorized, it is submitted, to incorporate into its contract for water supply any reasonable provisions which it desires to adopt. Were this not the case such a law would in most cases prove ineffectual. Few, if any, could be found willing to risk the amounts of money necessary to construct water works if the city might at any time establish water works of its own, and, backed up by the city treasury, become a competitor.

The question whether the city has the right to authorize third parties to enter the field as competitors does not arise in this case. Whether the city could rightfully enter into a similar contract with third parties is an entirely different question from that now before the court, and so far as our claim in this suit is concerned it may be conceded the city might rightfully do this.

Point VII.

A Contract with a Municipal Corporation is Within the Protection of Section 10, Article 1, of the Constitution.

This contract being between a private corporation and a municipal corporation, is protected under the constitutional provision equally with a contract between individuals.

Chief Justice Marshall, in the case of *State of New Jersey vs. Wilson*, 7 Cranch., 166, said:

"The constitution of the United States declares that no state shall pass any law impairing the obligations of a contract. In the case of *Fletcher vs. Peck*, 6 Cranch, 83, it was decided by this court on solemn argument and much deliberation that this protection of the constitution extends to a contract to which a state is a party as well as to contracts between individuals."

Point VIII.

There was a Good and Sufficient Consideration for the Contract.

The benefits the city expected to derive from its contract with the water company constituted a good and valid consideration to support it.

This court, in the case of the *Home of the Friendless vs. Rouse*, 8 Wallace, 437, said:

"There is no necessity for looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes a consideration for the contract, and no other is required to support it. This has been the well settled doctrine of this court on this subject since the case of *Dartmouth College vs. Woodward.*"

Home of the Friendless vs. Rouse, 8 Wallace, 437.

Point IX.

The argument that the city by such a contract deprives itself of its legislative or governmental power does not apply, where, as in the present case, the city couples with its covenant not to erect water works a reservation of the right to buy the water works of the company at a fair price.

The city, by such a contract, is not in the slightest divested of its power to provide and maintain its own system of water works for the

use of the city. Upon the contrary such a right is expressly reserved by the contract. By the very terms of the contract the city could at any time, whenever it should determine to furnish water by means of works owned by itself, secure such works by purchase of respondent. The contract with the water company was something more than the ordinary exercise of the legislative function, while it clearly included the exercise of a legislative function, and hence the act becomes a *law*, it becomes also a *contract* which must be construed, protected and treated in all respects as though the city making it were divested of every attribute of sovereignty or power to legislate.

Point X.

It was Not Necessary the Contract with the Water Company should have been Submitted to a Vote of the Freeholders.

Defendants, referring to the contract between plaintiff and defendant, aver in their answer as follows:

"We allege that the terms of said contract *was* (were) not before the same was entered into, or at any time, or at all, submitted to a vote of the taxpayers of the said city at a special elec-

tion called by the city council therefor, nor was (were) the same submitted to a vote of the taxpayers at any time, or at all." (Record, 22.)

The conclusive answer to this is that there was no provision of law requiring this to be done. It will be observed by an inspection of Section 11 of the city charter (Record, 2) that two separate and distinct specific powers are conferred upon the City of Walla Walla in the matter of providing for a water supply for the city. *First*, the city itself is empowered to erect and maintain water works; and, *Second*, it is empowered "*to authorize*" the erection of the same (Record, 2). It is further provided in the same section that when the *first* power is exercised by the city erecting its own works, that then the propoition shall be submitted to a vote of the freeholders of the city. This proposition is in these words: "But no water works *shall be erected by the city* until a majority of the voters who shall be those only who are freeholders in the city, or pay a property tax therin on not less than five hundred dollars' worth of property, shall, at a general or special election, vote for the same. Such proposition shall be formulated and submitted not less than thirty days before election."

There is, therefore, no such requirement when the city "*authorizes* the erection of such works." It was not essential to its validity, therefore, that

this contract with the water company "*authorizing* them to construct and maintain water works" should have been submitted to a vote of the freeholders of the city.

It must be conceded, therefore, that the contract set out in the complaint is in all respects valid, and entitled to the protection of Section 10, Article 1, of the constitution against any attempt at an impairment of its obligation upon the part of the state, or, which is the same thing, the City of Walla Walla.

Point XI.

The Ordinance of the City of Walla Walla Approved June 20, 1893, and Proceedings thereunder (Record, 10-13) Constitute a *Law* within the Meaning of Section 10, Article 1, of the Constitution.

The ordinance of the City of Walla Walla passed the council June 20, 1893, and approved by the mayor June 20, 1893, (Record, 10-13), and the vote of the city in pursuance thereof (Record, 13) constitute a *law* within the meaning of the provision, "No state shall pass any law impairing the obligation of contracts," Article 1, Section 10, of the constitution of the United States.

Saginaw Gas Co., vs. Saginaw, 28 Fed. Rep., 29.

Citizens Street Railway vs. Memphis, 53 Fed. Rep., 715.

Citizens Street Railway vs. City Railway Co., 56 Fed. Rep., 746.

Santa Anna Co. vs. Buenaventura, 56 Fed. Rep., 339.

Capital City Gas Co. vs. Des Moines, 72 Fed. Rep., 818.

Baltimore Trust Co. vs. Baltimore, 64 Fed. Rep., 153.

Wright vs. Nagle, 101 U. S., 791.

Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 258-266.

Bacon vs. Texas, 163 U. S., 207.

New Orleans Water Works Co. vs. New Orleans, 164 U. S., 471.

If a municipal ordinance is in scope and character the exercise of a power to legislate delegated to such municipality by the state, it is a *law* of the state within the meaning of the constitutional provision prohibiting a state from

passing any law impairing the obligation of contracts.

Wright vs. Nagle, 101 U. S., 791.

Williams vs. Bruffy, 96 U. S., 176, 183.

New Orleans Water Works vs. Louisiana Sugar Co., 125 U. S., 18-31.

Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 258.

Bacon vs. Texas, 163 U. S., 207.

New Orleans Water Works Co. vs. New Orleans, 164 U. S., 471.

Baltimore Trust Co. vs. Baltimore, 64 Fed. Rep., 153.

In *Bacon vs. Texas*, 163 U. S., 207, Mr. Justice Peckham says:

"As stated in the case reported in 125 U. S., *supra*, *(New Orleans Water Works Co. vs. Louisiana Sugar Refining Co.)*, it is not necessary that the law of a state, in order to come within this constitutional prohibition, should be either within the form of a statute enacted by the legislature in the ordinary course of legislation, or in the

form of a constitution established by the people of the state as their fundamental law. A by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law within the meaning of this article of the constitution of the United States."

Again, in *New Orleans Water Works Co. vs. New Orleans*, 164 U. S., 471, Mr. Justice Harlan says:

"In view of the adjudged cases, it cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the legislature of the state, and are to be respected by all * * *. We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the state, it will be time enough for equity to interfere and by injunction prevent the execution of such ordinance."

In the case 164 U. S., *supra*, this court declined to attempt to control the discretion of the New

Orleans city council in advance of legislative action by such council, holding it would be time enough to interfere after action to restrain by injunction the execution of an unconstitutional ordinance.

That the passage by a city of an ordinance, and a vote of the city in accordance with the power conferred in the municipal charter providing for the erection of water works, is "an exercise of legislative power," must, in view of repeated decisions, be considered as removed from all controversy. This court, speaking by Mr. Justice Harlan, in *New Orleans Water Works Company, vs. Rivers*, 115 U. S., 674-681, says:

"The right to dig up and use streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with water, is a franchise belonging to the state, which she could grant such persons or corporations, and upon such terms as she deemed best for the public interests."

Point XII.

Jurisdiction.

There can be no question that the circuit court had jurisdiction of this case. This is clear from what has already been said. It may be further added, however, that the right for the protection of which the respondent has invoked

the process of the court, is one secured to it, as claimed by the respondent, by the constitution of the United States, and the thing complained of is a *law* alleged to be void as violating the same constitution.

Does the constitution of the United States, Section 10, Article 1, protect the complainant against the acts complained of?

No question could more clearly show a "matter in dispute arising under the constitution of the United States." In such a dispute original jurisdiction is given the Circuit Courts of the United States by the act of March 3, 1875.

The very question involved, is as to the construction, application, force and effect of this section of the federal constitution.

This court, in *Railroad Company vs. Mississippi*, 102 U. S., 141, said:

"That a case in law or equity consists of the right of one party, as well as of the other, and may properly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either; that cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right, or privelege, or claim, or protection or defense of the party, in whole or in part, by whom

they are asserted; that, except in the cases of which this court is given, by the constitution, original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form or both, as the wisdom of congress may direct; and lastly that it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the constitution or laws of the United States; but when a question to which the judicial power of the union is extended by the constitution forms an ingredient of the original cause, it is within the power of congress to give the circuit court jurisdiction of that cause, although other questions of fact or of law may be involved in it."

R. R. Co. vs. Miss., 102 U. S. 141.

That the circuit court had jurisdiction, therefore, of this case, does not seem to admit of a doubt, and as there is no adequate remedy at law, injunction is the proper and appropriate remedy.

Osborn vs. United States Bank, 9 Wheaton, 738.

Crescent City Live Stock Co. vs. Butchers Union, 9 Fed. Rep., 743.

New Orleans Water Works vs. St. D. Water Works, 14 Fed. Rep., 194.

B. & B. vs. Allen, 17 Fed. Rep., 171.

Parsons vs. Mayre, 23 Fed. Rep., 113.

Citizens St. Ry. Co. vs. Memphis, 53 Fed. Rep., 715.

Barnes vs. Konegay, 62 Fed. Rep., 671.

Each of the foregoing cases involved the construction and application of Article 1, Section 10, of the constitution of the United States.

The general doctrine announced by Chief Justice Marshall in the leading case of *Osburn vs. the United States Bank*, in 9 Wheaton, 738, "That the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state, when to execute it would be to violate rights and privileges of the complainant that had been guaranteed by the constitution, and would do irreparable damage and injury to him," and which has been repeatedly affirmed by this court, notably in the case of *Pennoyer vs. McConnoughy*, 140 U. S., 1,

and in *Scott vs. Donald*, 165 U. S., 114, is applicable to the case at bar.

It is true in this case, no question as to the state being a party, therefore no question under the eleventh amendment to the constitution is involved; still it is applicable as ascertaining the general rule that the United States courts will by injunction restrain the execution of a law which is unconstitutional by reason of the fact that its exeeution would impair the obligation of a contract.

It is conceded that if it were absolutely certain that the City of Walla Walla had the power, at any time, on its own motion to arbitrarily repeal the ordinance authorizing the water company to construct water works, and abrogate its contract with the company, then the circuit court would have no jurisdiction of this case, as in that event no federal question could be presented, but one only of the law of the state apart from its connection with the other. But such, it is respectfully submitted, is not the case. The city by the passage of this ordinance and by its agreement with the water company becomes a party to a solemn contract which it cannot, at will, set aside without impairing its obligation, a thing, the state directly, or through its municipality, cannot do.

Point XIII.

No Reservation in the Charter to Alter, Amend or Repeal, and None, Except a Qualified One, in the Ordinance and Agreement.

It must be observed that no right to alter, amend or repeal the city charter under which this contract was made was reserved in the charter, neither is there any reservation of this character in the ordinance authorizing the contract (Record, 3-5), nor in the agreement made in pursuance thereof (Record, 6-8), except a qualified one in such ordinance and agreement. This qualified reservation in the ordinance is in the following words:

"And this contract shall be voidable by the City of Walla Walla, so far as it requires the payment of money, upon the judgment of a court of competent jurisdiction, whenever there shall be a substantial failure of such supply, or a substantial failure on the part of said company to keep or perform any agreement or contract on its part, herein specified or in said contract contained. But accident or reasonable delay shall not be deemed such failure. And until such contract shall have been so avoided, the City of Walla Walla shall not erect, maintain or become interested in any water works, except the ones herein referred to, save as hereinafter specified." (Record, 5).

Also the following in said ordinance:

"Neither the existence of said contract nor the passage of this ordinance shall be construed to be, or be, a waiver of, or relinquishment of, any right of the city to take, condemn and pay for the water rights and works of said or any company at any time; and in case of such condemnation the existence of this contract shall not be taken into consideration in estimating or determining the value of the said water works of the said Walla Walla Water Company." (Record, 5).

These reservations are also in *hæc verbæ* in the agreement with the water company. (Record, 7-8).

It is not contended that there has ever been any judgment of any court of competent jurisdiction avoiding said contract, either for the reasons stated in such reservation or any other, nor has there ever been any attempt upon the part of the city to obtain such judgment. It can not be said, therefore, that any right upon the part of the city to arbitrarily set aside this contract, to alter, amend or repeal it, was in any manner incorporated into, or became a part of, the contract itself. The contract, therefore is clearly brought within the protection of the federal constitution.

Infinitely stronger in this case is the reason why such a contract should be protected by the federal constitution, against the impairment of its

obligation by a state, than in the case of exemption from taxation of particular parcels of property, or of property of particular persons or corporations, in which cases it has been frequently held by this court such exemption became a part of the contract, and it is thus brought within the constitutional protection and will be protected, except there be reservation in the charter or grant or whatever it may be, of the right to alter, amend or repeal.

New Jersey vs. Wilson, 7 Cranch., 164.

Jefferson Bank vs. Skelly, 1 Black, 436.

Home of the Friendless vs. Rouse, 8 Wallace, 430.

Wilmington Railroad vs. Reed, 13 Wallace, 264.

Barnes vs. Konegay, 62 Fed. Rep., 671.

The Rhode Island Case.

The case of *Seaman's Friend Society, et. al. vs. Town of Westerly, et. al.*, in the Circuit Court of the United States for the District of Rhode Island, not yet reported, is one very similar to that now under discussion. In that case the charter

authorized the town to construct water works and also to contract for a water supply. Judge Carpenter, in his opinion, granting a preliminary injunction, said:

"On the other hand, to refuse relief here would be to permit the destruction of the whole contract. There must be some rights which are entitled to be protected under a contract admitted and found to be valid. Turning, then, to the substantive question which it seems to me must be here decided, the question is whether the contract here in dispute contains an implicit reservation founded on the then existing state law of the right of the town at pleasure to construct water works. The law gives power to construct water works, and also to contract for a water supply, and, as incidental to such contract, to confer certain rights and exemptions on the contractors. Does this leave it competent for the town to make a contract with this corporation, and afterwards, without any default alleged on the part of the corporation, and in derrogation of the terms of the contract, to constrnct other works? The question is not whether the town may grant a franchise to be exclusively exercised by the company for a term of years, without regard to its ability or willingness to furnish an adequate supply of suitable water; but the question is, rather, whether the town has not by its own act, under *one* branch of the law, limited its power to act under the *other* branch of the act. Answering

this question in the affirmative, I find that the town is making the attempt to exceed the limits so set."

Where a city contracts in its corporate capacity through its officers, acting by authority of an ordinance of the common council, the city is not at liberty to annul the contract by an ordinance so made repealing the contract. Having made the latter, the city is bound by it.

State vs. Heath, 30 La. Ann., 1721.

It has no more rights in that respect than an individual.

Hewitt vs. Town of Alton, 7 N. H., 257.

West Saving Society vs. Philadelphia, 31 Pa. St., 175.

Prather vs. New Orleans, 24 La., 41.

Davenport Gas Co. as. Davenport, 13 Iowa, 233.

The following arose under Article 1, Section 8 of the constitution of the United States, reserv-

ing to congress the power to regulate commerce with foreign nations and among the several states, and in which injunctions were issued:

U. S. Express vs. Hemmingway 39 Fed. Rep., 60.

Am. Fertilizing Co. vs. Board of Ag., 43 Fed. Rep., 609.

Spellman vs. New Orleans, 45 Fed. Rep., 3.

Cuban Steamboat Co. vs. Fitzpatrick, 66 Fed. Rep., 63.

Donald vs. Scott, 67 Fed. Rep., 854.

The following cases of restraint by injunction arose under other provisions of the constitution of the United States:

Claybrook vs. Owensboro, 16 Fed. Rep., 297.

Hospes vs. O'Brien, 24 Fed. Rep., 145.

Stillman vs. Hudson River Bridge Co., 4 Batch., 74.

Baird vs. Short Line Railway Co., 6 Batch., 276.

In the case of *Lehigh Water Company vs. Easton*, 121 U. S., 388, no contract was then existing between the town and the water company, hence, there was nothing to prevent the town from erecting public water works in competition. A number of like cases may be found in the books.

SECOND.

DID THE CONTRACT WITH THE WATER COMPANY CREATE AN INDEBTEDNESS, WHICH, WITH OTHER AND EXISTING INDEBTEDNESS, EXCEEDED $50,000, CONTRARY TO SECTION 105 OF THE CITY CHARTER?

As has been already shown, in addition to the powers conferred on the City of Walla Walla by Sections 11 and 12 of its charter (Complaint, Recork, 2), additional powers relating to water, light, taxation and revenue were granted by Sections 3, 4, 6 and 10 of the same charter as cited, *supra*, page — of this brief.

Before considering these in this connection, however, the attention of the court is attracted to the state of the pleadings as bearing upon this question of illegal indebtedness.

THE PLEADINGS.

POINT I.

Indeed, it is a very serious question whether there are in the pleadings averments sufficient to enable the plaintiffs in error to attack the contract on the ground that it created an indebtedness beyond the limit fixed by the charter. The only averments on the subject are the following in the complaint: "That the said city at said time (the date of the contract May 9, 1887) was indebted in a sum exceeding $16,000, and that in and by Section 105 of its charter it was forbidden to create an indebtedness of more than $50,000," (Record, 3). While the answer admits this allegation in terms, but makes no averment or claim whatever that the execution of this contract created an indebtedness beyond the limit fixed by the charter (Record, 21-22), but on the contrary, in its further answer, avers one reason only for such contract being *ultra vires*, as follows. The answer in attacking the contract says: "We deny that the same was duly or regularly made or entered into, and we deny that said contract has at any time been or is now, or ever was, a valid or binding contract between said complainant and the said City of Walla Walla, and allege that the same is *ultra vires* and invalid. We allege that the terms of said con-

tract were not, before the same was entered into, or at any time, or at all, submitted to a vote of the taxpayers of said city at a special election called by the city council therefor, nor was the same submitted to a vote of the taxpayers at any time or at all." (Record, 22-23).

It will thus be seen that the failure to submit the terms of the contract to a vote of the taxpayers is the *only* ground upon which it is claimed such contract is *ultra vires*.

It is respectfully submitted, therefore, the pleadings do not entitle plaintiffs in error to insist the contract is *ultra vires* for or on account of an excess of indebtedness.

Point II.

The Powers of the City as to Taxation and Revenue.

Sec. 3 of the act incorporating the City of Walla Walla, which took effect January 1, 1884, provides as follows:

"The City of Walla Walla has power to assess, levy and collect taxes for general municipal purposes, not to exceed one-half per centum per annum, upon all property, both real and personal, within the city which is by law taxable for territorial and county purposes, and to levy and collect special taxes as hereinafter provided; but

all taxes for general and special municipal purposes shall not exceed in any year one and one-half per centum on the property assessed,"

While by Sec. 4 it is provided: "The City of Walla Walla shall have power to make regulations for the prevention of accidents by fire, to organize and establish fire departments, and shall have control thereof, and ordain rules for the government of the same. To provide fire engines and other apparatus and a sufficient supply of water, and to levy and collect special taxes for these purposes, not to exceed in any year three-tenths of one per centum upon the taxable property within the city."

Section 10 provides as follows: "The City of Walla Walla is hereby authorized to grant the right to use the streets of said city for the purpose of laying gas and other pipes, intended to furnish the inhabitants of said city with light or water, to any person or association of persons, for a term not exceeding twenty-five years."

Point III.

Does the contract to pay for supplying the city with water for municipal purposes, in quarterly installments as the water is furnished, at the rate of $1500 per annum for twenty-five years, create an indebtedness for the whole $37,-

500 that *may possibly* ultimately become payable, within the meaning of Section 105 of the city charter? It is respectfully insisted that it does not. The clause of the city charter is as follows:

"SEC. 105. The limit of indebtedness of the City of Walla Walla is hereby fixed at $50,000." (Record, 3).

There is nothing in the act organizing the Territory of Washington requiring the legislature of the territory to limit the amount of indebtedness of a municipal corporation.

It is not claimed, I believe, nor indeed could it be, that this contract in any manner contravenes the act of Congress of July 10, 1886, prohibiting municipal corporations from ever becoming indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum of the value of the taxable property within such corporation, from the fact that it appears from the pleadings that the taxable value of the property of Walla Walla is more than $3,000,000 (Complaint, Record, 14), four per cent of which would be $120,000. This averment is admitted in the answer. (Answer, Record, 25).

Courts in construeing a statute should lean towards that interpretation which will further the object of the legislation, rather than toward one based solely on artificial rules. In this case one

great purpose of the city charter is to enable the city to provide the municipality with water and light. Each of these involves large annual expenditures, and the very nature of the business requires that the contract for such supply shall extend over a great number of years. The provision, therefore, limiting the indebtedness of the city, must be construed in the light of these other provisions, under which the ordinary business of the city can only be carried forward.

Section 105 of the city charter of Walla Walla must be construed in connection with all of the other provisions of the charter, and in such manner as to give it a sensible construction in the light of such other provisions and so as to avoid absurd consequences.

In *U. S. vs. Kerby*, 7 Wall., 483, this court, speaking through Justice Field, said:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will therefore be presumed that the legislature intended exceptions to its language which would avoid results of this character."

And so in *Pollard vs. Bailey*, 20 Wall., 525, this court, speaking through Chief Justice Waite, said:

"The intention of the legislature, when properly ascertained, must govern in the construction of every statute. For such purposes the whole statute must be examined. Single sentences and single provisions are not to be selected and construed by themselves, but the whole must be taken together."

So far as I have been able to examine the decisions of this court, the pricise question presented in this case as to what constitutes a municipal indebtedness under a similar provision to that of the Walla Walla charter, has never been decided. In the state courts, however, and also in the United States circuit courts there have been many cases arising under different provisions in state constitutions and in city charters limiting state, county and municipal indebtedness, in which questions almost identical with that presented here have been determined. That these authorities are to some extent conflicting is conceded, but that the great weight of authority, as well as the better reason sustain the views for which I am contending, I confidently insist.

Point IV.

Authorities.

Mr. Dillon, in his work on Muncipal Corporations, Sec. 88, in discussing this very question, says:

"When a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues, and such special taxes as it may legally and in good intent levy, therefore such contract does not constitute 'the incurring of indebtedness' within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts."

In a lengthy note in the forty-fourth American State Reports, pages 229-243, in which the different phases of this question are discussed at length and authorities collated and cited, there will be found the following summing up which fully sustains the view for which we are contending:

"If a contract is made for the erection of water works, or for any other improvement, and the time of payment is postponed to some date or dates in the future, we apprehend that there is no conflict of decision upon the subject and that the sums to become due in the future must all be taken into consideration in estimating the amount of the existing indebtedness of the municipality; *Culberson vs. City of Fulton*, 127, Ill., 30; but where the contract or ordinance is one intended to provide for the furnishing of a municipality with water to be used for public purposes, or with lights for the streets, or other public places, and

payment is to be made for such water or lights from year to year, this is but a mode of providing for the necessary current expenses of the municipal government; and while it is true the municipality has no discretion not to become liable from year to year for the amount which it has agreed to pay, *yet the almost overwhelming weight of authority is that it is not to be regarded as indebtedness* within the meaning of these constitutional or statutory limitations, *except for the amount which has actually fallen due under the contract or ordinance*, and that it must, therefore, be sustained, although the amount which will ultimately become due under it may greatly exceed the limit of indebtedness which the municipality is authorized to incur. *East St. Louis vs. East St. Louis L. Etc. Co.*, 98 Ill., 415; 38 Am. Rep., 97; *Crowder vs. Sullivan*, 128 Ind., 486; *Valparaiso vs. Gardner*, 97 Ind., 1; 49 Am. Reps., 417; *Smith vs. Dedham*, 144 Mass., 177; *Grant vs. City of Davenport*, 36 Ia., 396; *East St. Louis Gas Lighting Co. vs. East St. Louis*, 45 Ill. App., 5[illegible]; *Lott vs. City of Waycross*, 84 Ga., 681; *Merrill Railway Light Compauy vs. Merrill*, 80 Wis., 358."

44 American Reports, 240.

In the case *The Merrill Railway and Lighting Company vs. The City of Merrill*, 80 Wis., 358, which was a case wherein the city had agreed to pay to an electric lighting company $2,050 per

year for eight years, in quarterly installments, for the lighting of its streets and the city hall, there being a provision in the city charter to the effect that "No tax for general city purposes shall be levied in any year exceeding two per cent. of the assessed valuation of the taxable property of the city, and that the city shall have no power to borrow money or contract any debt which can not be paid out of the levy of the fiscal year which shall commence," etc., the court said:

"The presumption must be that the city is able to meet its obligations and to pay its just debts, nothing appearing to the contrary. It is true the contract is to continue for eight years, but the city will have only to provide for and pay a debt of $2,050 during any fiscal year. We can not presume that this sum will exceed the amount the city will realize by the two per cent. tax, or that the indebtedness incurred each year on the contract will go beyond the revenue of such fiscal year. Therefore, we are unable to sustain the position of the learned counsel for the city that the common council had no power under its charter to make the contract for lighting its streets and public buildings."

The Merril Railway and Lighting Co. vs. The City of Merrill, 80 Wis., 360.

The above case was decided on a demurrer to the complaint. It did not appear from the com-

plaint in that case that the annual revenues would be sufficient within the limitation of the charter to meet all indebtedness, including that of the contract in question. The court held, however, that there could be no presumption to the contrary indulged in.

The case now before this court is infinitely stronger in this respect, from the fact that it clearly appears from the pleadings that the annual revenues of the city of Walla Walla are largely in excess of its ordinary expenses, including also the $1,500 to be paid annually under the contract in question.

A public statute of the state of Massachusetts provided as follows:

"SEC. 6. That towns may incur debts for temporary loans, in anticipation of the taxes of the year in which debts are incurred, and the year next ensuing, and expressly made payable therefrom by vote of the town."

Section 7 of the act provided as follows:

"SEC. 7. That other debts than those mentioned in the preceding section shall be incurred only by a vote of two-thirds of the voters present and voting at a town meeting."

The town of Dedham in Massachusetts voted to authorize its selectmen to make a contract with a water company to supply the town with water

for fire and other purposes for a term of years, at a certain sum, to be paid annually. This proceeding did not receive the approval of a vote of two-thirds of the voters present and voting. It was held, however, by the supreme court of that state in the case of *Smith et al., vs. The Town of Dedham*, 10 N. E. Rep., 782, that said contract was valid and not in violation of the above statute. The Court, Gardner J., in passing upon the question said:

"The contract which the selectmen are authorized to make is one which we assume is to be paid annually among the other current expenses of the town, the payments to be made out of the moneys annually granted by the town and raised by taxation. It is in effect a cash transaction, where the payments are made *pari passu* with the accumulation of the yearly service which determines the amount to be paid. *Grant vs. Davenport*, 36 Iowa, 396. It is like the other ordinary expenses of the town within the limit of its annual current expenses. The town of Dedham, by its vote, *did not incur a debt* within the fair meaning of Pub. St., C. 29, Sec. 1. A majority of the court is of the opinion that the statute was not intended to apply to contracts made for the current expenses of the town, and payable out of the current revenues of the several years in which the water company is to furnish water to the town. *Lacock vs. Baton Rouge*, 35 La. Ann., 475."

Smith vs. Town of Dedham, 144 Mass., 177.
10 N. E. Rep., 782.

No obligations imposed by a contract to pay money becomes a debt until the money is payable. *Weston vs. Syracuse*, 110 N. Y., 110; *Garrison vs. Howe*, Id., 458. Such a contract would consist of dependent promises, of which the performance would be severable and divisible, and no debt would be created. *Willington vs. West Boylston*, 4 Pick., 101; *Badger vs. Titcomb*, 15 Pick., 409; *Knight vs. New England Worsted Co.*, 2 Cuch., 271, 290; *Oviatt vs. Hughes*, 41 Barb., 541. Nothing would be payable except upon a contingency, and an obligation depending upon a contingency does not create a debt. *People vs. Arguello*, 37 Cal., 524; *Wood vs. Partridge*, 11 Mass., 488, 493. It was so held in the state of Massachusetts in cases arising under the Trustee process, (*Wentworth vs. Whittemore*, 1 Mass., 471, 473; *Thorndyke vs. De Wolf*, 6 Pick., 120; *Meacham vs. McCorbitt*, 2 Metc., 352), and also in cases involving liability of stockholders and officers for corporate debts (*Boardman vs. Osborn*, 23 Pick., 295). So under insolvent laws where the term "debts" is used in its broadest sense, and in other cases. *Woods vs. Partridge, ubi supra; Davis vs. Ham*, 3 Mass., 33; *Child vs. Boston & Fairhaven Iron Works*, 137 Mass., 516, 520; *Bent vs. Hubbardson*, 138 Mass., 99, 100; *Deane vs. Caldwell*, 127 Mass., 242.

In *Saleno vs. Neosho*, 127 Missouri, 627 (48 Am. St. Rep., 653) it was held that "contracts for the annual supply of municipalities with such necessaries as light and water, and contracts for the payment therefor, do not create a debt for the aggregate amount which may become due upon a compliance with the terms of the contract, within the meaning of the constitutional provision limiting the yearly indebtedness which may be incurred by the city."

In the case *supra*, *Saleno vs. Neosho*, the court, after collecting the authorities supposed to hold to the contrary view, says (page 660):

"It is worthy of remark that, in each one of the cases cited, the constitutional limit of indebtedness had been reached before the contract had been made, except *Niles Water Works vs. Niles*, 59 Mich., 311, and in that case one of the members of the court, Sherwood, J., dissented. No such claim is made as to the City of Neosho."

The court, proceeding further in the case, *supra*, says:

"Among the authorities which hold to the contrary rule, and that the word 'indebted,' as used in state constitutions, as in Section 12, Article 10 of the constitution of Missouri, does not include contracts for the annual supply of municipalities with such necessaries as light and water and of similar character, and contracts for

the payment therefor do not create a debt for the aggregate amount which may become due upon a compliance with the terms of the contract, may be cited the following: *Dively vs. Cedar Falls*, 27 Iowa, 227; *Grant vs. Davenport*, 36 Iowa, 401; *Budd vs. Budd*, 59 Fed. Rep., 957; *State vs. McCauley*, 15 Cal., 429; *Koppikus vs. State Capitol Commrs.*, 16 Cal., 248; *People vs. Pacheco*, 27 Cal., 207; *Carlyle Water, Etc. Co. vs. Carlyle*, 31 Ill. App., 339; *City of Carlyle vs. Carlyle Water Etc. Co.*, 140 Ill., 445; *Crowder vs. Sullivan*, 128 Ind., 486; *Valparaiso vs. Gardner*, 97 Ind., 1; 49 Am. Rep., 416; *Weston vs. Syracuse*, 17 N. Y., 110; *Utica Water Works Co. vs. Utica*, 31 Hun., 430; *Smith vs. Dedham*, 144 Mass., 179. See, also, 1 Dillon on Municipal Corporations, 4th Ed., Sec. 135. Our conclusion is that the weight of authority is adverse to the contention of defendant and is in accord with the spirit and meaning of our constitution as we understand it, and as we think also comports with better reason."

Saleno vs. City of Neosho, 127 Missouri, 627.

All the above cases, also the case of the *Appeal of the City of Erie*, 91 Pa. State Rep., 403, referred to later in this brief, are cited with approval in *Budd et al vs. Budd et al*, by the United States Circuit Court for the Western District of Missouri, 59 Federal Reporter, 735. This is a late case, decided February 6, 1894.

The provision of the constitution of the State of Missouri adopted in 1865, and which was under consideration in the case *supra*, is as follows:

"SECTION 14, ARTICLE 11. The Joint Assembly shall not authorize any county, city or town to become a stockholder in or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

In the case of the *Appeal of the City of Erie*, 91 Penn. St. Rep., 403, it was held:

"If the contracts or engagements of municipal corporations do not overreach their current revenues, no objection can lawfully be made to them, however great the indebtedness of such municipality may be, for in such cases their engagements do not extend beyond their present means of payment, and so *no debt is created*."

In the case of *John Weston vs. The City of Syracuse*, 17 N. Y., 110, it was held by the court of appeals that the obligation of a contract to render service does not become a debt within the sense of the prohibitions of the charter placing a limit upon the amount of indebtedness, until money becomes payable according to its terms.

Judge Denio, in delivering the opinion in the above case, said:

"But the compensation to this contractor was not a debt within the sense of this provision, until the service was performed and the contractor was entitled to be paid. It was no doubt an obligation, in some sense, from the time the contract was entered into, but it was not a debt in the popular sense, and certainly not one to which the correlative term payment could with propriety be applied, and it is such debts only which the provision speaks of."

In *State vs. McCauley*, 15 California, 456, the court, speaking through Justice Field, held that a contract for the payment of $10,000 per month to one Estill on his lease of the prison and convicts, did not create a debt within the meaning of the constitutional provision of that state limiting indebtedness, except as the services were each month performed. The only difference between that case and the one at bar was that in the former an appropriation was made at the time of the making of the contract.

Chief Justice Field, at page 455 of the case, *supra*, said:

"Until the services are rendered there can be no debt on the part of the state." And again: "To support the convicts is as much the duty of

the state as to provide for the salaries of her officers, and constitutes one of the ordinary sources of the state's expenses; and authorizing a contract to keep the prisoners at a fixed price, the payment on the services being future acts, is no more in conflict with the constitution than the law fixing the salaries of the judges and other officers of the government, and providing for their payment through the treasury of the state. The eighth article was intended to prevent the state from running into debt, and to keep her expenditures, except in certain cases, *within her revenues.*"

The same doctrine was approved in the case of *People vs. Pacheco*, 27 Cal., 176.

The constitutional amendment being an amendment to the constitution of the State of Indiana, adopted in 1881, reads as follows:

"No political or municipal corporation in this state shall ever become indebted in any manner or for any purpose to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for a state and county tax previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount, given by such corporation, shall be void."

The supreme court of the State of Indiana in the *City of Valparaiso vs. Gardner*, 97 Ind., 1; 49 Am. Reps., 417, in discussing the question as to whether a contract for a necessary supply of water for twenty years, at an expense in the aggregate beyond the limit of indebtedness which the city could ordinarily incur, payments to be made annually as the water is furnished, and not exceeding the constitutional limit of indebtedness in any way, said:

"The question is a grave one, and not entirely without difficulty. If we hold that the contract to pay an annual water rent of $6,000 during a period of twenty years creates a debt for the aggregate sum of $120,000, and is a debt within the prohibition embodied in the constitution, we should lay down a principle that would, in a great majority of instances put an end to municipal government. If it be true that an agreement to pay a given sum each year, for a long period of years, constitutes a debt for the aggregate sum resulting from adding together all the yearly installments, then it is extremely doubtful whether there is a city in the state that has authority to repair a street, dig a cistern or build a sidewalk, for nearly every city has contracts for gas and water supplies running for a long series of years, in which the aggregate amount of annual rents would of themselves equal, if not exceed, the limit of two per centum on the value of taxable property. We know as

a matter of general knowledge that water works and gas works require the outlay of enormous sums of money, and that such enterprises are not undertaken under contracts running for short periods of time. If the aggregate sum of all the yearly rents is to be taken as a debt within the meaning of the constitution, then many cities will be left without the means of procuring things so essential to public welfare and safety. We are not to presume, unless coerced by the rigor of the words used, that the framers of the amendment, or the electors who voted for it, intended to destroy the corporate existence of our municipalities, or to leave them without water or light. Nor are we to presume that the electors were ignorant of the existence, condition and necessities of our great towns and cities. On the contrary, we are to presume that these things were known to the electors, and that they intended to foster the best interests of these instrumentalities of local government * * * *. We agree that if it be found that the language used is clear and explicit, we must give it effect, no matter how disastrous the consequences may be. While it is our duty to yield to the words of the constitution, still in determining what meaning they were intended to have, it is proper to consider the circumstances under which the provision was adopted and the object it was intended to accomplish. Cooley, Const., 5th Ed., 78, 79."

The court, proceeding further in the case of *Valparaiso vs. Gardner*, *supra*, and after a thorough review of the cases bearing upon the question, says:

"Our leading purpose is, therefore, to ascertain what meaning the authors of the constitution intended the word 'indebted' to have, and we address ourselves to its accomplishment. It is clear that if the city should fail to perform its contract, the recovery would be for damages for a breach of contract and not the contract rate of compensation, and, therefore, it can not be true that the whole of the compensation is certainly demandable by the corporation with which it contracts. It may be that but a small part of even one year's compensation can be recovered. On the other hand, the failure of the water company to perform may put an end to the contract, and that would, of course, terminate all liability of the municipal corporation. There could be no action maintained against the city for the recovery of compensation under the contract without evidence that the water had been furnished, and this proves that there is no indebtedness until the water has been supplied in accordance with the terms of the contract. The effect of the proposed contract is that the city shall be liable for water as it is furnished, and not before. It is not until after the water has been furnished that there can be justly said to be a debt, for while there might be a liability for damages in case of a breach on

the part of the city, there is certainly none under the contract until the city has received that for which it contracted. If it can pay this indebtedness when it comes into existence without exceeding the constitutional limitation, then there is no violation of the letter, and surely none of the spirit, of the constitution. We are careful to say 'when the debt comes into existence,' and not to say 'when it becomes due,' for between these things there is an essential difference. The object to be accomplished by the amendment, the condition and necessities of our municipalities, as known to the authors of the amendment (the court is referring to the amendment to the constitution limiting indebtedness), and the just force of the language employed, authorize us to conclude that the inhibition of the constitution does not apply to contracts for water to be paid for as the water is furnished, provided it is shown that the contract price can be paid from the current revenues as the water is furnished, and without increasing the corporate indebtedness beyond the constitutional limit. The adjudged cases sustain our conclusion."

City of Valparaiso vs. Gardner, 97 Ind., 1.

Crowder vs. Town of Sullivan, 128 Ind., 487.

East St. Louis vs. East St. Louis, Etc. Co., 98 Ill., 415.

Dively vs. City Cedar Falls, 27 Ill., 227.

First Dillon Municipal Corporation, 3d Ed., Sec. 135.

Grant vs. City of Davenport, 36 Ia., 396.

State vs. McCauley, 15 Cal., 429.

People vs. Pacheco, 27 Cal., 175.

Again in *Crowder vs. Town of Sullivan*, 128 Indiana, 487, (28 N. E. Rep., 94) the court said:

"When a municipal corporation contracts for a usual and a necessary thing, such as water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly installments, since the debt for each year does not come into existence until the compensation for each year has been earned. It may be true that the contract creates an obligation, for a breach of which an action for damages will lie, but it does not create a right of action for the unearned compensation. The earning of each year's compensation is essential to the existence of a debt. If municipal corporations cannot contract for a long period of time for such things as light or water the result would be disastrous; for it is a matter of common knowledge that it requires a

large outlay of money to provide machinery and appliances for supplying towns and cities with light and water, and that no one will incur the necessary expense for such machinery and appliances if only short periods are allowed to be provided for by contract. The courts cannot presume that the legislature meant to so cripple the municipalities of the state as to prevent them from securing light upon reasonable terms and in the ordinary mode in which such a thing as electric light or gas is obtained, but it is not necessary to discuss this point at greater length, for we regard the law upon it as settled by the adjudged cases. *City of Valpariso vs. Gardner*, 97 Ind., 1, and authorities cited; *City of New Albany vs. McCulloch*, (Sup. Ct. Ind.) 26 N. E. Rep., 1074; *East St. Louis vs. East St. Louis, Etc. Co.*, 98 Ill., 415; *Appeal of City of Erie*, 91 Pa. St., 398; *Grant vs. Davenport*, 36 Iowa, 396; 1 Dill. Mun. Corp. (4th Ed.), Sec. 135."

Crowder et. al. vs. Town of Sullivan, (Supreme Court of Indiana, June 13, 1891), 28 N. E. Rep., 94.

The only point decided in the case of *Sackett vs. City of New Albany*, 88 Indiana, 473, was this: That where the constitution of a state forbids any municipal corporation ever to become indebted beyond a certain amount "in any manner

or for any purpose," that amount cannot be exceeded even for necessary current expenses. This, also, was the question in the case of *Prince vs. City of Quincy*, 105 Illinois, 138 (44 Am. Rep., 785). The contract under consideration in *Sackett vs. City of New Albany*, was one with the Gamewell Fire Alarm and Telegraph Company, for three fire alarm strikers and five signal boxes, to be completed and placed in position for the city by the first of April, then ensuing, for the aggregate sum of $3,325. A very different kind of contract, as the court will see, from that now under consideration, in this case.

Section 3 of Article 11 of the constitution of the state of Iowa is as follows:

"No county, or other political or municipal corporation, shall be allowed to become indebted, in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum of the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists previous to the incurring of said indebtedness."

The Supreme Court of Iowa in *Dively vs. City of Cedar Falls*, 27 Iowa, 233, in construing this provision of the constitution, held as follows:

"An obligation arising under a contract on the part of a municipal corporation to pay for

work, when, and as it shall be performed in the future, does not constitute or ripen into an indebtedness within the meaning of the constitution until the performance of the work."

Dively vs. City of Cedar Falls, 27 Iowa, 228.

Judge Wright, in delivering the opinion in that case, said:

"It is insisted, however, that the liability was created when the contract was made; that the city then became indebted but the obligation to pay so far as the time of its inception as between the parties is concerned, is one thing, and the actual indebtedness within the meaning of the constitution quite another."

Again, in *Grant vs. Davenport*, 36 Iowa, 398, it was provided by a certain ordinance that the city agrees to pay for 240 hydrants at $80 each for the first five years, and $70 each for the next five years, at $60 each for the next five years, at $50 each for the next five years, and at $40 each for for the remainder of the time of the charter, the rent to commence as soon as 200 hydrants are ready for use. The question was, did this ordinance impose a debt on the city within the meaning of the constitutional provision limiting indebtedness? The court held that it did not, and

held further, "that where a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limits of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute 'an incurring of indebtedness' within the meaning of the constitutional provision limiting the power of a municipal corporation to contract debts."

Grant vs. Davenport, 36 Iowa, 398.

In case *The City of Council Bluffs vs. Stewart*, 51 Iowa, 395, this case of *Grant vs. Davenport*, *supra*, was cited and the rule therein stated approved.

Section 12 of Article 9 of the constitution of the State of Illinois is identical with, and in fact was taken from, a similar provision, Article 11, Section 3, of the constitution of the State of Iowa, as follows:

"No county, or other political or municipal corporation, shall be allowed to become indebted, in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum of the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists, previous to the incurring of said indebtedness."

In the case of *Buchanan vs. Litchfield*, 102 U. S., 278, the construction of the twelfth section of the ninth article of the constitution of Illinois was under consideration, this court holding that city bonds issued by the city under a statute of the state authorizing cities to construct water works, and for that purpose to appropriate and borrow money and levy and collect general taxes in the same manner as other municipal taxes, the city at the time of such issue being indebted up to the full limit fixed by the constitution, were, in the hands of an innocent holder, *void*. This was the *sole* question in any wise bearing upon the issue in this case, passed upon by this court in that case, and was, it is submitted, a very different one from that presented by the case at bar. This decision was at the October term, 1880.

That the Supreme Court of the State of Illinois did not regard the decision of this court in the case *supra* as *applicable* to a case such as now before this court is clearly evident from the fact that subsequently to this decision *supra*, at the May term, 1881, of the Supreme Court of the State of Illinois, a question similar to the one now under consideration was before that court, that court then holding as follows:

"Where a city entered into a contract for lighting its streets for a term of thirty years, the agreed price therefor to be paid monthly, which sum for any one year was not in excess of the

limitation in Section 12 of Article 9 of the constitution, but taken for the whole term, was in excess of the debt it was authorized to incur, it was held that the contract was not prohibited by the constitutional provision but was regular and binding, there being created *no present indebtedness for the whole sum*, but only as the gas *should be supplied from month to month.*"

East St. Louis vs. East St. L., Etc. Co., 98 Ill., 417.

The court in passing upon the question in case 98 Ill., *supra*, said:

"It is insisted further that the city had no power to make the contract in question, because thereby an indebtedness was incurred in excess of the limitation fixed by Section 12, Article 9 of the constitution of this state. The provision in this respect is that no municipal corporation 'shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum of the value of the taxable property therein,' etc. * * * *. It appears that the previous indebtedness of the city, existing at the time this contract was made, was $20,000 short of this constitutional limitation. Two hundred lamps—the minimum number provided by the contract—at $35.20 per lamp per year, would amount to $7,040 in a year, and the aggre-

gate for thirty years to $211,200. Now, the appellant's counsel contend that this aggregate sum of $211,200 should be considered as the present indebtedness, as a debt incurred at the making of this contract on October 3, 1880. We do not assent to the correctness of this view. The contract was for the furnishing of an article for nightly consumption by the city during a period of thirty years, fixing the price at which the article should be furnished. There was no indebtedness in advance of anything being furnished, but indebtedness arose as gas should have been furnished along from night to night during the period of thirty years. The contract provides for the payment monthly, at the end of each month, the amount that became due for the month then ended. When the company has furnished the gas for a certain month, then there is a liability—an indebtedness arises—and not before, as we conceive. Hence, the amounts that might become due and payable under the contract in future years did not constitute a debt against the city at the time of entering into the contract, within the meaning of the constitution."

E. St. Louis vs. E. St. L. L. G. L. & W. Co., 98 Ill., 431.

It is conceded the supreme court of Illinois has not, in reference to this question, been very stable or consistent with itself, inasmuch as it has declared somewhat different views upon this

subject from those so clearly and ably set forth in 98 Illinois, *supra*, both before and after that decision, notably, in the case of the *City of Springfield vs. Edwards*, 84 Illinois, 626, followed in *Culbertson et al. vs. City if Fulton et al.*, 127 Illinois, 36, and also in *Prince vs. City of Quincy*, 128 Illinois, 444. It is respectfully submitted, however, that in none of these cases is the opinion supported by the authority or reason by which that in the 98th Illinois is sustained. It would seem, furthermore, that the view enunciated in the 98th Illinois is supported by the Illinois court of appeals, in 31 Ill. App., 338, and also in the case of *City of Carlyle vs. Carlyle W. L. & P. Co.*, 140 Illinois, 445.

The constitutional restriction on indebtedness in the constitution of the state of Iowa, and a similar provision in the constitution of the state of Illinois, have been before this court quite frequently, notably in *Buchanan vs. Litchfield*, 102 U. S., 278, in *Litchfield vs. Ballou*, 114 U. S., 190, in *Doon Township vs. Cummins*, 142 U. S., 366, and in *Nesbit vs. Riverside Independent District*, 144 U. S., 610, but in each of these cases there had been an over issue of bonds—in *Doon Township vs. Cummins*, *supra*, by a district township of Iowa, and in the latter case by a school district, In the case in the 142 U. S., *supra*, this court. speaking through Mr. Justice Gray, clearly recognizes the distinction between this class of

cases and the class to which the one now before the court belongs, in these words:

"In the Supreme Court of Iowa, it is settled law that the constitutional restriction includes not only municipal bonds but all forms of indebtedness, *except warrants for money actually in the treasury, and perhaps contracts for ordinary expenses within the limits of the current revenues.*"

It is conceded by the pleadings that the revenues of the City of Walla Walla at the date of the execution of this contract, including the revenues which it was authorized by law to raise by taxation, would be equal to $10,000 per annum in excess of all its ordinary expenses. The averment of the complaint is as follows: "That its revenues, including the revenues which it was authorized by law to raise by taxation, did not and would not exceed its ordinary expenses by more than $10,000 per annum." (Complaint, Record, 3). While the averment in the answer on this subject is as follows: "We admit that its revenues including the revenues it was authorized by law to raise by taxation, did not and would not, exceed its ordinary expenditures by more than $10,000 per annum." (Answer, Record, 22). These averments, therefore, are the equivalent of saying that the annual revenues of the city authorized by law to be raised by taxation were at least $10,000 in excess of the ordinary expenditures of the city.

The leading authorities recognize a wide difference between what are known as current expenses of the municipality, payable out of current revenues, and extraordinary expenses, such as interest on railroad bonds, and the like. It is the item of expenses essential to the maintenance of corporate existence, such as lighting, water, sewers, salaries of officers, labor and the like that constitute current expenses payable out of current revenues. The authorities agree that current revenues may be applied to such purpose, even though the effect be to postpone judgment creditors.

Coy vs. City Council, 17 Ia., 1.

Coffin vs. City Council, 26 Ia., 575.

Grant vs. City of Davenport, 36 Ia., 396.

When the current revenues are sufficient to fully pay the current expenses necessarily incurred to maintain corporate levy, there cannot be said to be any debt.

City of Valparaiso vs. Gardner, 97 Ind., 1, and authorities *supra*.

The decision of this court in *Lake County vs. Rollins*, 130 U. S., 862, does not in the least mili-

tate against the doctrine for which I am contending. In that case there was no question but that the issue of the county warrants, which were the subject of the action, was the creation of a debt. That these warrants created an indebtedness to the extent of the amount called for was admitted.

The question in that case was simply whether the constitutional provision in the constitution of the State of Colorado limited the amount of *all* indebtedness of *every nature* and for *every purpose*, or whether the limit only applied to debts by loan for the two purposes of, *first*, erecting necessary public buildings, and *second*, making or repairing public roads and bridges. This court held the provision was clear, direct and free from ambiguity, and was "a limitation upon the power of the county to contract any and all liabilities, including those sued upon in that action," beyond the amount specified in the constitutional limitation.

This case, therefore, and indeed all other cases decided by this court, so far as I have been able to examine, leaves it an open question as to what constitutes an *indebtedness* within the meaning of that term as used generally in constitutions and charters, especially as used in the Walla Walla charter as follows: "The limit of indebtedness of the City of Walla Walla is hereby fixed at $50,000."

It leaves it an open and undecided question whether the execution of a contract to pay $1,500 per annum, payable quarterly, for water furnished a municipality, to be paid for as furnished, and running through a period of twenty-five years, creates *eo instanti* an *indebtedness* within the meaning of such clause, of the whole $37,500; or, does it only become such indebtedness when the water is furnished and the contingent liability ripens into an indebtedness, the city having full power under its charter to raise by taxation ample revenue each year to meet such indebtedness.

It is respectfully submitted the authorities, state and federal, are overwhelmingly to the effect that in such case the amount only becomes such indebtedness as the water is furnished and the money becomes due.

The contention is not that it is not a debt merely because the time of payment has been deferred, but rather that it does not become a debt at all until the water is furnished and the right to collect attaches.

In some cases it has been held that in order to prevent a liability from becoming a debt, within the meaning of a clause limiting the amount of indebtedness, it is necessary at the time of creating the liability to provide for levying and collecting taxes sufficient to meet it. But in the most, if not all, of such cases it will be found on

examination the provision limiting the indebtedness makes such a proceeding necessary.

For instance, the provision in the state constitution of Texas, Article 11, Sections 5 and 7, is as follows:

"No city shall ever incur a debt for any purpose or in any manner, unless at the same time provision is made for levying and collecting a tax sufficient to pay the interest and a sinking fund of at least two per cent per annum."

But even in this view, ample provision is made in the city charter for levying and collecting each year a tax sufficient to meet annually the $1,500 called for by this contract, in addition to an amount necessary to meet all other ordinary expenses of the city.

The case of *Colson vs. the City of Portland*, 1 Deady, 481, does not involve or touch the question involved in this case. The question there to be decided, as stated by Judge Deady in his opinion, was this: "Can the city legally issue interest coupons to railroad bonds, payable half yearly, through a period of twenty years, amounting in the aggregate to over $300,000.

In regard to the contention that the city has exceeded its power in creating debts in excess of $50,000, it is scarcely necessary to do more than cite what was said by the court below in its opinion in regard to this matter. The court said:

"The aggregate amount to be paid under the contract by the city cannot be regarded as a debt incurred in excess of the amount limited by the 105th section of the charter, for, by the terms of the contract, the city became obligated to pay in quarterly installments as the same should be earned by compliance with the contract on the part of the water company. If any part of the money is not earned, the city will not have to pay it. If the money shall be earned, the city will avoid an accummulation of debt by paying according to the contract. Notwithstanding the very respectable authorities cited by counsel for the city, I hold that while the contract creates a binding obligation, it does not create a debt. The item of expense for water under this contract stands precisely the same as other items of regular current expenses incidental to running the government and provided for by contracts or ordinances of the city." (Record, 345).

Point V.

In any Event the Contract is Only Void to the Extent that it Creates an Indebtedness in Excess of the Constitutional Limits.

Conceding for the argument that the whole sum covered by the contract, twenty-five times

fifteen hundred, equaling thirty-seven thousand five hundred dollars, ($37,500), was, as of the date of the contract, an indebtedness within the meaning of Section 105 of the city charter, it would not by any means render the contract wholly void. It is submitted it would only be void and incapable of enforcement insofar as this $37,500, added to the existing debt of the city, would exceed the $50,000 limit of the charter. The pleadings (Complaint, Record, 3; Answer, Record 21) show that the City of Walla Walla, at the time this contract was made, was, to use the language of both complaint and answer, "*indebted in a sum exceeding sixteen thousand dollars.*" It nowhere appears, however, either in the pleadings or evidence, what amount *in excess* of $16,000 the city was then indebted. It may have been one dollar, one hundred dollars or five thousand dollars; but for all the purposes of this suit the court will not presume the existence of an indebtedness greater in amount than will meet and fully satisfy the allegations in the case—$16,500 will do this. There is no claim it was more than this, or indeed as much. It was simply a sum exceeding $16,000. We add sixteen thousand five hundred, therefore, to thirty-seven thousand five hundred, and we have an aggregate of indebtedness, conceding the whole $37,500 to be a debt within the meaning of the charter, of $54,000, or an indebtedness of $4,000 only in excess of the limit fixed by the charter.

On the ground assumed, therefore, by the appellant that a debt of $37,500 was created *eo instanti* by the execution of the contract, $33,500 of it would be valid. The contract would only be invalid, it is submitted, insofar as it created an indebtedness in excess of the power of the city to contract a debt, and, therefore, only void as to the last two years and seven months of the twenty-five years the contract run.

McPherson vs. Foster, 43 Ia., 48.

Wiley vs. Silliman, 62 Ill., 170.

Grant vs. City of Davenport, 36 Ia., 401.

Dively vs. Cedar Rapids, 27 Ia., 227.

AUTHORITIES.

"Statutes that are constitutional in part only, will be upheld so far as they are not in conflict with the constitution, provided, the allowed and prohibited parts are severable. We think a severance is possible in this case. It may be conceded the ordinance is too broad, and that some of its provisions are unwarranted."

Packett Co. vs. Keokuk, 95 U. S., 89.

Conceding for the purpose of argument, that the contract for $37,500 created an indebtedness, it would only be invalid as to the extent of the excess over and above the constitutional limit.

Hasbroucke vs. Milwaukee, 13 Wis., 37.

East St. Louis vs. Gas Co., 98 Ill., 415.

McPherson vs. Foster Brothers, 43 Iowa, 48.

Stockdale vs. Wayland School Dist., 47 Mich., 226.

Culbertson et al. vs. City of Fulton et al., 127 Ill., 38.

Mix vs. People, 62 Ill., 241.

2 Dillon on Mun. Corp., Sec. 334, 335 and note.

In the case of *McPherson vs. Foster Brothers*, 43 Iowa, 48, the court having under consideration a contract to build a school house, for which the contractors were to receive $15,000 in bonds of the district, when the amount of indebtedness for which the district could lawfully contract for was only $2,057.50, the supreme court of that state said:

"We have seen that for the excess over the prescribed limit no right of action exists against the district. The question now arises, Is the district liable to the amount of the indebtedness within the restricted limit? We think it is. We have seen the constitutional inhibition operates upon the indebtedness, not upon the form of the debt. The district may become indebted to the amount of $2,057.50 by bond. If the debt exceeds that amount it is void as to the excess, because of the inhibition upon the power of the district to exceed the limit, and the bonds as to the same excess are void because of the non-existence of a valid debt therefor. But this restriction does not extend to the sum of $2,057.50 for which the district had power to issue its bonds. That sum is a valid debt."

In the case of *Culbertson et al. vs. City of Fulton,* 127 Illinois, *supra*, the court said:

"The indebtedness, however, can only be regarded as void to the excess over the constitutional limit. Up to and under that limit the indebtedness is valid. The inhibition operates upon the indebtedness and not upon the form of the debt."

The following is the conclusion of lengthy note in 44 Am. St. Reps., 242-243:

"All indebtedness incurred beyond the constitutional limit is void and not enforcable, while, perhaps, there may be instances in which the ordinance or contract attempting to create indebtedness is of an indivisible character, so that it will be difficult, if not impossible, to sustain a part and disregard the residue; yet no case of that character has come within our observation, and the decisions up to the present time have treated as valid such part of the indebtedness as fell within the constitutional limit. Where the dates of the issue of the several obligations can be ascertained, those first issued are treated as valid until the constitutional limit is reached; but where such is not the case and all the obligations appear to have been incurred, or evidence of indebtedness issued at the same time, each is treated as partly valid and partly void, and a recovery may be sustained thereon, based upon the proportion which the indebtedness that the municipality was authorized to incur bears to the whole indebtedness attempted to be incurred. *Daviess County vs. Dickenson*, 117 U. S., 657; *Citizens Bank vs. Terrell*, 78 Tex., 450; *McPherson vs. Foster*, 43 Ia., 48; 22 Am. Rep., 215; *State vs. Maher, Etc.*, 32 Neb., 568; *Dunn vs. Great Falls*, 13 Mont., 58."

The contract in question is a divisible one. Conceding that the whole amount $37,500, is a present indebtedness within the meaning of the clause in the city charter, and conceding further-

more that this amount was by four thousand dollars in excess of the limit of indebtedness beyond which the city could not go, the contract is clearly good up to the fifty thousand dollar limit. It is not believed, however, the court will find it necessary to consider this phase of the case.

It is respectfully submitted the decree of the circuit court should be affirmed.

JOHN H. MITCHELL,
Solicitor for Respondents.

THE IRWIN-HODSON CO., PORTLAND, ORE.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE CITY OF WALLA WALLA *et al.*, Appellants,

vs.

THE WALLA WALLA WATER COMPANY, Appellee.

No. 250.

Appeal from the Circuit Court of the United States for the District of Washington.

Supplemental Brief of John H. Mitchell, on part of Appellee, and in reply to Brief on part of Appellants.

The former brief on part of appellee having been prepared before that on part of appellants was filed, it is deemed proper that a few suggestions supplemental, and also in reply, should be submitted.

I.

Counsel for appellants seek to raise the question of jurisdiction of the court below.

It is respectfully submitted, inasmuch as the question of jurisdiction *alone* was not certified to this court from the court below, as provided by the last clause of the first subdivision of section 5 of the act of March 3, 1891, establishing Circuit Courts of Appeals, appellants are not permitted to raise the question here. Especially must this be so, as there is nothing in the case that would enable appellants to bring it direct to this court on appeal if it be true, as contended by counsel, that there is no Federal question involved. The alleged absence of any Federal question is the *sole* ground upon which counsel insist there was a lack of jurisdiction in the court below, and yet the *existence* of a Federal question is absolutely *essential* to the maintenance of this appeal.

Counsel in bringing the case here assume it is here properly on a Federal question, namely, one involving the construction and application of a clause of the Constitution of the United States, and now the court is asked to hold there is no Federal question involved for the purpose of denouncing jurisdiction in the court below. As no other question in the case is properly before this court, if it be true there is no Federal question in the case, then the case can not be said to be here at all

on a question *other* than that relating to jurisdiction of the court below. Were it here on a question *other* than one involving the jurisdiction of the court below, then *possibly* this court might also pass upon that question.

Horner *v.* The United States, 143 U. S., 576.

But conceding the case to be properly here on questions other than those affecting the jurisdiction of the court below, it is not perfectly clear, from the opinion in Horner *v.* The U. S. (*supra*), whether the court meant to be understood as holding where a case came direct to this court, and in which the constitutionality of a law of Congress is drawn in question, that this court acquires jurisdiction of all questions involved, *including* the question of the jurisdiction of the court below, *or* of all questions involved, *except* that of the jurisdiction of the court below.

It is submitted, as the act relating to appeals and writs of error prescribes a *special mode* of having the question of jurisdiction of the court below determined by this court—namely, by a certification from the court below—that a failure of a party to conform to this mode should be regarded as a waiver of the question. But a still more conclusive reason why this court should not pass upon the question of jurisdiction of the court below in the absence of a certification is, that it is only by such certification that this court can acquire jurisdiction to do so.

The claim of counsel for appellants that no Federal question is involved, and, therefore, the court below had no jurisdiction, can not be maintained.

The claim of counsel for appellants that the acts of the city of Walla Walla, in contracting with the Walla Walla Water Company, and in passing the ordinance providing for the erection of water works were not the exercise of sovereignty; that the city in those matters was not acting as the agent of the State, but was merely exercising a power as trustee and agent of the city and its citizens, representing solely their pecuniary and proprietary interests, can not be maintained for one moment. Besides, this claim on the part of counsel is in direct conflict with the subsequent claim of counsel in their brief, while contesting another branch of this case.

No one thing has ever been more definitely or distinctly settled by this court, than the proposition that an ordinance and contract of a city, authorizing a corporation to dig up and use streets and alleys for the purpose of laying pipes and mains, for the purpose of supplying a city with water, under a charter empowering a city to do so, is an *exercise of legislative power.* It is the *granting of a franchise* belonging to the state.

New Orleans Gas Company *v.* Louisiana Light Company, 115 U. S., 650–660;

New Orleans Water Works Company *v.* Rivers, 115 U. S., 674–681;

The State *ex rel.*, etc., *v.* The Cincinnati Gas Light and Coke Co., 18 Ohio St. Rep., 291;

Crescent City Gas Light Co. *v.* New Orleans Gas Light Co., 27 La. Ann., 138;

St. Tammany Water Works *v.* New Orleans Water Works, 120 U. S., 64;

New Orleans Water Works *v.* Louisiana Sugar Co., 125 U. S., 31.

In the case of Rivers (*supra*), this court, speaking by Mr. Justice Harlan, said:

"The right to dig up and use streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with water, *is a franchise belonging to the State*, which she could grant such citizens or corporations, and upon such terms as she deemed best for the public interests."

The Supreme Court of the State of Ohio, in the case 18 Ohio (*supra*), said:

"We think it can not be doubted that the right to use the streets of the city for the purpose of laying pipes to convey gas, whether in the hands of a private corporation or a natural person, *is a franchise*, and as such can *only emanate directly or indirectly from the sovereign power of the State*, and the position that the city council of Cincinnati, in making the contract with Cameron, is to be regarded as a private corporation, granting an easement in its own property, can not be maintained."

The Supreme Court of Louisiana, in case of Crescent City Gas Light Company *v.* New Orleans Gas Light Company (27 La. Ann., 138–147), said:

"The right to operate gas works to illuminate a city is not an ancient or usual operation of citizens generally. No one has the right to dig up the streets and lay down

gas pipes, erect lamp posts, and carry on the business of lighting the streets and houses of New Orleans *without special authority from the sovereign. It is a franchise belonging to the State*, and in the exercise of the police power the State could carry on the business itself or select one of several agents to do so."

It is respectfully submitted, therefore, that the claim of counsel that the contract between the city of Walla Walla and the Water Company, as exemplified by the city ordinance and the written contract made in pursuance thereof (Record, 3–8), was not the act of the State, and therefore no Federal question was involved, and hence the conclusion that the court below, for this reason, had no jurisdiction, both parties to the suit being citizens of the same State, is untenable, and can not be successfully urged here.

Besides, conceding for the argument, that the making of the contract with the Water Company was not the exercise of sovereignty upon the part of the city, and that it was a valid contract between the parties—the city acting, not as the agent of the State, but simply as the representative of the pecuniary and proprietory interest of the citizens of the city—even then, it is a *contract* the *obligations of which* are protected against impairment by the Constitution, and if in the subsequent proceedings of the city in providing for the erection of its own water works it acted as the agent of the State and exercised sovereign functions, then a Federal question was involved. That the city did so act in providing for the erection of its own water works counsel concede, and indeed insist upon it in the latter part of their brief.

Besides, if this contention of counsel for appellants (see their brief, 2–10), is granted, then this appeal must be dismissed for want of jurisdiction in this court.

If there were no Federal question involved in this case, where do the appellants get their authority for this appeal?

What are the Chartered Powers of the City of Walla Walla?

Attention of the court is attracted to the following specification of powers of the city of Walla Walla under its charter approved November 28, 1883, which went into effect January 1, 1884, and under which the contract with the Water Company was made:

Section 2. By this section the inhabitants within the city of Walla Walla are constituted and declared to be a municipal corporation, by the name and style of the "*City of Walla Walla,*" and it is empowered to "*contract and be contracted with.*"

* * * * * *

Section 3 provides: "The city of Walla Walla has power to assess, levy and collect taxes for general municipal purposes, not to exceed one-half per centum per annum, upon all property, both real and personal. * * * And to levy and collect special taxes, as hereinafter provided, but all taxes for general and special municipal purposes shall not exceed in any year one-half per centum on the property assessed."

* * * * * *

Section 4. By this section the city is empowered "to make regulations for *prevention of accidents by fire.*" "To organize and establish fire departments, and shall have control thereof, and ordain rules for the government of the same."

This section confers the further power "to provide fire engines and other apparatus, and a *sufficient supply of water.*" This section further authorizes the city "*to levy and collect special taxes for these purposes,* not to exceed in any year three tenths of one per centum upon the taxable property," etc.

* * * * * *

Section 9. "The city of Walla Walla shall have power to cause every person to keep his property, or the property he occupies or controls, and the adjacent streets and alleys, *clean and free from all things dangerous to health, or offensive to the senses, or dangerous to travellers, and to keep said streets and alleys free from inflammable material,* and to cause owners of public halls and other buildings to provide suitable means of exit, *to abate all nuisances, and provide for the public safety.*"

* * * * * *

Section 10. By this section it is provided that:

"The city of Walla Walla is hereby authorized *to grant the right to use the streets of said city for the purpose of laying gas and other pipes* intended to furnish the inhabitants of said city with light *or water,* to any persons or association of persons, *for a term not exceeding twenty-five years,* and to authorize and forbid the location and laying down of tracks for railways and street railways, telegraph and telephone appliances, on all streets, alleys, public places," etc.

* * * * * *

This section has the further provision, "provided always that none of the rights or privileges herein

granted shall be exclusive, *nor prevent the council from granting the same right to others.*"

* * * * * *

Section 11. By this section it is provided as follows:

"The City of Walla Walla shall have power to erect and maintain water works within or without the city limits, *or to authorize the erection of the same,* for the purpose of furnishing the city, or the inhabitants thereof, with a sufficient supply of water. *And for the purpose of maintaining and protecting the same from injury, and the water from pollution, its jurisdiction shall extend over the territory occupied by such works, and all reservoirs, streams, springs, trenches, pipes and drains used in, and necessary for, the construction, maintenance and operation of the same, and over the streams or sources from which the water is taken for five miles above the point from which it is taken, and to enact the ordinances and regulations necessary to carry the power herein conferred into effect;* but no water works shall be erected by the city until a majority of the voters, who shall be those only who are free-holders in the city, or pay a property tax therein on not less than $500 worth of property, shall, at a general or special election, vote for the same. Such proposition shall be formulated and submitted not less than 30 days before election." (Rec., 2.)

Section 12. By this section the city is—

" authorized and empowered *to condemn and appropriate so much private property as shall be necessary for the construction and operation of such water works,* and shall have power *to purchase or condemn water works already erected, or which may be erected,* and may mortgage or hypothecate the same to secure to the persons from whom the same may be purchased the payment of the purchase price thereof; said city shall have power to regulate the sale of water thus brought therein, and the moneys arising shall constitute a fund to be used to defray the expenses of operating the same, and to pay the purchase price thereof; and said city may levy and collect a

special tax each year, until the necessity therefor ceases to exist, not to exceed two-tenths of one per centum: *Provided*, however, no such tax shall be levied or collected until the question has been submitted, as provided in section 11 of this act, to electors as therein named, and a majority thereof at an election shall favor the same." (Record, 2.)

* * * * * *

Section 22. By this section it is provided as follows:

"The city of Walla Walla shall have power to adopt proper ordinances for the government of the city *and to carry into effect the powers given by this act.*"

* * * * * *

Section 23. By this section it is provided as follows:

"The city of Walla Walla shall have power to establish and regulate the fees and compensation of all its officers, except when otherwise provided, *and have such other power and privileges not here specifically enumerated as are incident to municipal corporations.*"

* * * * * *

Section 24. By this section it is provided as follows:

"The power and authority hereby given to the city of Walla Walla by this act shall be *vested in a mayor and council*, together with such other officers as are in this act mentioned, or may be created under its authority."

* * * * * *

Section 43. This section provides as follows:

"The *city council* shall possess *all the legislative power granted by this act.*"

* * * * * *

Section 90. By this section it is enacted as follows:

"The city of Walla Walla is not bound by any contract, or in any way liable thereon, *unless the same is authorized by a city ordinance and made in writing and by order of the council, signed by the clerk or some other person in behalf of the city.* But an ordinance may authorize

any officers or agent of the city, naming him, to bind the city without a contract in writing for the payment of any sum of money not exceeding $100."

* * * * * *

Section 99. By this section it is provided, among other things, as follows:

"And the city of Walla Walla *may exercise the right of eminent domain to take any private property for any use of the city embraced within any of the objects or purposes of this act.*"

* * * * * *

Section 103. This section provides as follows:

"The rights, powers and duties, and liabilities of the city of Walla Walla, and of its several officers, *shall be those prescribed in this act,* and this act is hereby declared a *public act.*"

* * * * * *

Section 105. This section provides as follows:

"The limit of indebtedness of the city of Walla Walla is hereby fixed at $50,000."

Section 106. This section reads--

"All acts and parts of acts relating to the incorporation of Walla Walla City, and not herein reserved, are hereby repealed."

Act of November 28, 1883; Session Laws, Territory of Washington, 1883, pages 270–288.

It is believed the foregoing are all the provisions of the charter under which the contract in question was made, which can have any possible bearing upon the questions involved. Those sections quoted which refer specially to the powers of the city as to taxation have bearing more particularly on the question as to whether

the city exceeded its limit of indebtedness in the contract made with the Water Company; while sections 103 and 106 have reference to the repeal of the act of December 1, 1881, relied on by counsel for appellants. (See their brief, page 38.)

The question arises, therefore, did the city of Walla Walla have power to make the contract with the Water Company? It is respectfully submitted it did have such power.

ARGUMENT.

It is not claimed that the city of Walla Walla has the power under this charter to grant any *exclusive franchises*, in the ordinary sense of those terms, to any one water company. On the contrary, it is conceded at the outset that the city has *not* the power to grant to, or to contract with one person, company, or corporation, for a water supply of the city, in such manner or on such terms as will prevent it from granting a similar franchise on the same or different terms to another person, company, or corporation, or indeed any number of them. And it is submitted the contract in question does not attempt to do this.

The contention, however, is this: That the fair, logical, and indeed only proper construction of the charter is, that in the event the city determines, *instead* of erecting its own water works, as empowered to do by the eleventh section of the charter, to *authorize* their erection by another party, either individual, company, or corpo-

ration, as also empowered by section 11 of the charter, that *then* the city possesses the *incidental power* of stipulating either that the city will not, during the period covered by such contract—in this case twenty-five years—erect water works of its own, and thus become a competitor; *or* if it does, it will only do so by purchasing the works of the company contracted with, provided always, that such stipulation is of such character as will not in any substantial manner deprive the city in the future, in the full exercise of the police power, of protecting the public health, the public morals, and the public safety of the city.

It is conceded the city has not the power, under its charter, to contract away any of its legislative functions the exercise of which may be necessary in the future to protect the public health, the public morals, or the public safety of the city.

But having the power *expressly* granted by the charter to contract with a water company *for the use of the streets for twenty-five years*, and having the alternative power conferred upon it to either erect water works of its own or *authorize their erection*, and having availed itself of this latter mode of securing a water supply, instead of erecting its own works, then, it is respectfully submitted, it possesses the *incidental* power to make any kind or character of contract, as to *non-competition by the city*, it may deem essential to effectuate the purpose of the *express* power, *provided* always, that the stipulations of such contract do not involve any surrender of legislative power, the exercise of which is or may be, in any man-

ner, or to any extent, *essential* to the preservation of the public health, the public morals, and the public safety.

This, it is submitted, is the fair, reasonable, and proper construction of the powers vested in the city by this charter. And that the act of the city in making this contract has been wholly within the scope of the powers conferred, I shall endeavor to show later on.

What are the powers which a municipal corporation can exercise?

Mr. Dillon, in his work on Municipal Corporations, says, and his definition has been frequently cited with approval by this court:

First, Those granted in *express* words:

Second. Those ~~essential~~ necessarily or *fairly* implied in, or *incident to*, the powers expressly granted; and

Third. Those ~~necessary~~ Essential to the declared objects and purposes of the corporation.

It is true, there is no express authority given in the charter authorizing the city, *in terms*, to stipulate, in a contract with an outside party, for a water supply for the city, that the city would not, during the period covered by the contract, erect works of its own, or if it did, that it would only do so by purchasing those of the company, but it is respectfully submitted, in the very nature of things, is not such a power *fairly*, if not,

indeed, *necessarily included in, and incident to*, the power *expressly* granted? But not only so, is not such a power,—to be exercised always, as already stated, without encroaching upon the police powers of the city, in so far as the exercise of such power is necessary to the protection of the public health, the public morals, and the public safety—a power *absolutely essential* to the declared objects and purposes of the corporation?

What person, or company, or corporation, in any State of this Union, in sane moments, could be induced to expend vast sums of money, the expenditure of which is always necessary in erecting a water plant for any city, however small, if it were understood that the city could, at any moment, erect water works of its own and become an immediate competitor with its contractor, and thus destroy the value of the contractor's works?

It is submitted that the *express* grant of power, empowering the city, at its option, to "*authorize the erection of water works*," instead of *erecting such works itself*, necessarily carried with it such *incidental powers*, the exercise of which are *essential*, in order to enable the city to effectuate the purpose of such express power. And it is plain that such *incidental power* can be exercised, and, indeed, was, as a matter of fact, exercised in the making of the contract in question, without trenching in the slightest degree upon the sovereign power of the city to protect, by the exercise of its police power, the public health, the public morals, and the public safety of the city.

But always keeping distinctly in view this preserva-

tion of the police power, for the three purposes specified, is there not in the city charter, outside of the particular clauses authorizing a contract for a water supply, and the use of the streets for such purposes, for twenty-five years, ample *express power* to justify the action of the city in inserting in their contract with the water company the provision that the city would not, during the existence of the contract, erect water works of its own, unless by purchase of the company's works?

The city, as has already been shown, is *expressly empowered* by the charter "*to contract and be contracted with.*" It is empowered *expressly*, in the eleventh section of the charter, "to authorize the erection of water works," and in the twelfth section to "*purchase or condemn water works, already erected, or which may be erected.*" If the city had the right, as it unquestionably had, to purchase water works then erected, or that might thereafter be erected, then it had the undoubted right to take an option by contract to purchase works, either then erected or to be erected in the future. And having the clear right, not only to contract for and authorize the erection of works, but also to purchase the same after they were erected, then, if in order to exercise with effect these *express* powers it became necessary to stipulate that the city would not erect works of its own, and that was a question for the city *alone* to determine, it had the clear power to so stipulate, *provided* such stipulation did not operate as a surrender of any portion of the police power, the exercise of which might be necessary in the future for the three specific purposes already indicated.

Speaking of the necessity of governments at times surrendering portions of their legislative powers, and of granting inducements to capital, the following is in point.

This court, speaking by the late Justice Davis, in the Binghampton Bridge case (3 Wall., 74), said:

"The wants of the public are often so imperative that a duty is imposed on government to provide for them; and, as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the power of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public spirited citizens: 'If you will embark with your time, money, and skill in an enterprise which will accommodate the public necessities, we will grant to you for a limited period privileges that will justify the expenditure of your money and the employment of your time and skill;' such grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it."

As bearing upon the question of the *power* of the city under the charter to stipulate and agree with the Water Company that it would not during the period covered by the latter's contract, erect, maintain, or become interested in any water works, save those of the Walla Walla Water Company, except by taking, condemning, and paying for the said company's works, attention is attracted to the latter clause of section 10 of the charter.

This clause reads as follows:

"Provided, always, that none of the rights or privileges herein granted shall be exclusive, *nor prevent the council from granting the same right to others.*"

This provision clearly means that the power of the city to make these grants is to be unrestricted as to per-

son and number; that there is reserved to the city the power of making as many grants, or giving as many licenses to as many different persons as in the judgment of the city officials is deemed best. It evidently was not intended, however, to inhibit the city from agreeing to not become a competitor with its own contractor. If such were the intention of the legislature, then something more in the way of inhibition on the *incidental* powers of the city was necessary. If we are correct in holding that the *express* grants of powers contained in the charter carry with them the *incidental* power authorizing the city to make such an agreement, and as essential to the declared objects and purposes of the municipality, then we insist the clause at the close of section 10 (*supra*) can not be held to operate as an inhibition or limitation on the exercise of such *incidental* power. Had such been the purpose of the legislature, it would, in addition to having said, "That none of the rights or privileges herein granted *shall* * * * *prevent the council from granting the same right to others,*" have added:

"*Or the city from exercising the same, or similar rights.*"

The *inclusion* of the one is the *exclusion* of the other. Had the clause stopped with the word "*exclusive*" omitting the words, "*nor prevent the council from granting the same right to others,*" there would be more reason for holding that the city was estopped from agreeing not to become a competitor; but even then, it is respectfully insisted, the use of the words, "*shall not be exclusive,*" could only be properly construed as applicable to grants and licenses issued by the city conferring rights and

privileges on third parties, and not to acts of internal improvements carried on by the city itself.

It is submitted a fair construction of the charter as a whole justifies the conclusion that there is no restriction whatever, either in the clause in section 10 (*supra*), or in any other part of the charter, on the incidental power which clearly exists, authorizing the city to stipulate, as it did in the contract with the water company, not to become a competitor, except on condemnation and purchase; and having so contracted, the city is estopped from assailing the contract, both constitutionally and morally.

The contract does not limit the police powers of the city.

Upon the question that the contract with the water company does not in any manner, or to any extent, limit or circumscribe the police power of the city to protect the public health, the public morals, or the public safety, the court is referred to former brief on the part of appellee, pages 40–43; also pages 36, 47; also to discussion of that question in the present brief.

What was so well said by Mr. Justice Harlan upon a similar question in the Rivers case (115 U. S., 681) may with propriety and force be said in this case.

In that case, this court, after holding that there was in that case a contract whose obligations could not be impaired by the State, said:

"It is idle to insist that this contract was prejudicial either to the public health or to public safety, as might perhaps be said to be the case if the State, after making it, was prevented from exercising any control whatever

over the matter of supplying the city and its inhabitants with water. But notwithstanding the exclusive privileges granted to the plaintiff, the power remains with the State, or with the municipal government of New Orleans, acting under legislative authority, to make such regulations as will secure to the public the uninterrupted use of the streets, as well as prevent the distribution of water unfit for use, and provide for such a continuous supply in quantity as protection to property, public and private, may require. In the case just decided (New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S., 650), we said: 'The constitutional prohibition upon State laws impairing the obligation of contracts, does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts, Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense as are all contracts and all property, whether owned by natural persons or corporations.'"

New Orleans Water Works Co. *v.* Rivers, 115 U. S., 681.

In addition to statements in former brief (pages 40–43) showing that under this contract the city retains full control and power to protect the public health, the public morals, and the public safety, special attention is called to the provision of section 11 of the charter (Record, 2), by which *absolute jurisdiction and control* is retained by the city over all water works which may be erected—whether erected by the city or by a third party *authorized* by the city.

The clause is as follows:

"*And for the purpose of maintaining and protecting the same*" (the water works) "*from injury, and the water from pollution, its jurisdiction*" (the city of Walla Walla) "*shall*

extend over the territory occupied by such works, and all reservoirs, streams, springs, trenches, pipes, and drains used in and necessary for the construction, maintenance, and operation of the same, and over the stream or source from which the water is taken for five miles above the point from which it is taken, and to enact all ordinances and regulations necessary to carry the power herein conferred into effect."

Again, by section 9 of the charter, further jurisdiction and power are given the city over all persons, companies, and corporations owning, occupying, or controlling property within the city limits, which includes, of course, the Water Company, and whereby the city, notwithstanding the contract, can protect the public health, the public morals, and the public safety.

The section is as follows:

"*Section 9.* The city of Walla Walla shall have power to cause every person to keep his property or the property he occupies or controls, and the adjacent streets and alleys *clean and free from all things dangerous to health, or offensive to the senses, or dangerous to travellers; and to keep said streets and alleys free from inflammable material,* and to cause owners of public halls and other buildings to provide suitable means of exit, *to abate all nuisances, and provide for the public safety.*"

These clauses of course were incorporated into, and became a part of the contract, as did every other provision of the charter. And in virtue of these several provisions of the charter, as also the several reserved powers on part of the city *in the contract itself* (Record 6–8), the city is possessed of ample, in fact wholly unrestricted, power to protect the public health, the public morals, and the public safety, without in any manner or in the slightest degree impairing the obligation of its contract with the Water Company.

Even in the absence of any specific grant of power to the city of Walla Walla, authorizing the city to exercise the right of eminent domain, it would have that power; it is, however, specifically granted in the charter of the city. (Sec. 12 of city charter; Record, 2.) So it is clear the city had full power to stipulate to that effect in the contract; besides, without any such stipulation, the city had the power to condemn the works to its use by making just compensation, and not have been guilty of an act of Punic faith, a charge the city can not escape from in view of its present action.

This court, in the case of Rivers (115 U. S., 673), said:

"The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the company, under the State's power of eminent domain. (West River Bridge Company *v.* Dix, 6 How., 507; Railroad Company *v.* Louisa R. R. Company, 13 How., 71; Boston Water Power Company *v.* Boston and Worcester Railroad Company, 23 Pick., 360; Boston and Lowell R. R. Company *v.* Salem and Lowell R. R. Company, 2 Gray, 1–33.)

"In that way the plighted faith will be kept with those who have made large investments on the assurance of the State that the contract with them will be performed."

The execution of the contract with the Water Company, so far from being a surrender on the part of the city of its police power to protect the public health and the public safety was, it is submitted, a wise exercise of the power in furnishing the city and its inhabitants with good, wholesome, healthful water.

While the power of the State to protect, through her cities and towns and other public agencies, the public

health, the public morals, and the public safety, can not be relinquished or surrendered, yet the State and its municipalities may provide for these purposes any means that will effect the end, such as contracting with competent and trusty persons to take the matter in charge under the supervision and control of the State or city.

City of Louisville *v.* Weible *et al.*, Court of Appeals of Kentucky, 1st S. W. Rep., 605.

Indeed, it is quite impossible to imagine any act upon the part of the city that might at any time in the future become necessary for the protection of the public health, the public morals, or the public safety, but could be done by the city, either in its sovereign capacity as agent and representative of the State, or in its proprietory capacity as agent of the city and its inhabitants, and at the same time not impair the obligation of its contract with the Water Company.

The single fact that the Water Company agreed to *sell*, or what is the same thing, that the city might "*at any time take, condemn and pay for the water rights and works of the company,*" the city reserving expressly the right to take the company's works in that manner, with the further *express* stipulation, "that in case of such condemnation the existence of this contract shall not be taken into consideration in estimating or determining the value of the said water works of the said Walla Walla Water Company," is in and of itself a complete answer to the suggestion that the city in making this contract surrendered any portion of its police power.

For convenience of the court, this vital part of the contract is here given in *hæc verbæ:*

"And this contract is voidable by the city of Walla Walla, so far as it requires the payment of money upon the judgment of a court of competent jurisdiction, whenever there shall be a substantial failure of such supply, or a substantial failure on the part of the Water Company to keep or perform any agreement or contract on its part herein specified, or in this contract herein contained; but accident or reasonable delay shall not be deemed such failure. *And until this contract has been so avoided the city of Walla Walla will not erect, maintain or become interested in any water works, except the one herein referred to, save as hereinafter specified.*"

What is "*hereinafter specified,*" is as follows:

"Neither the existence of this contract, nor the passage of ordinance No. 270" (this is the ordinance authorizing the contract), "shall be construed to be, or be, a waiver of, or relinquishment of any rights of the city to take, condemn and pay for the water rights and works of said company or any company at any time, and in case of such condemnation the existence of this contract shall not be taken into consideration in estimating or determining the value of the said water works of the said Walla Walla Water Company."

The ordinance approved March 19, 1887 (Record, 3–5), and the written agreement made in pursuance thereof (Record, 6-8), constitute a valid contract.

In support of above proposition, see former brief (35–49, 56–64); also the following authorities:

This court, in the case of New Orleans Gas Company *v.* Louisiana Light Company (115 U. S., 660), speaking by Mr. Justice Harlan, said:

"It will, therefore, be assumed in the further consideration of this case, that the charter of the Crescent City Gas Light Company, to whose rights and franchises the present plaintiff has succeeded—so far as it created a corporation, with authority to manufacture gas and to distribute the same by means of pipes, mains and conduits, laid in the streets and other public ways of New Orleans—constituted, to use the language of this court in the case of the Delaware Railroad Tax (18 Wall., 206), 'a contract between the State and its corporators, and within the provision of the Constitution prohibiting legislation impairing the obligation of contracts,' and therefore 'equally protected from legislative interference, whether the public be interested in the exercise of its franchise, or the charter be granted for the sole benefit of its corporators.' (See, also, Greenwood *v.* Freight Company, 105 U. S., 13–20; New Jersey *v.* Yard, 95 U. S., 104.)"

And speaking further, this court, in the Louisiana Gas Company case (115 U. S.), says:

"If the State can, by contract, restrict the exercise of her power to contract and maintain highways, bridges, and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation by the granting of exemptions from taxation to particular individuals and corporations, it is difficult to perceive upon what ground we can deny her authority, when not forbidden by her own organic law—in consideration of money to be expended, and important services to be rendered for the promotion of the public comfort, the public health, or the public safety—to grant a franchise to be exercised

exclusively by those who thus do for the public what the State might undertake to perform, either herself or by subordinate municipal agencies."

This court, in New Orleans Water Works Company *v.* Rivers (115 U. S., 674), decided at the same term, again speaking by Mr. Justice Harlan, said:

"This case is therefore controlled by the decision just rendered in New Orleans Gas Light Company *v.* Louisiana Light Company (*ante*, 650). The two are not to be distinguished in principle. If it was competent for the State, as we have held, to provide for supplying the city of New Orleans and its people with illuminating gas, by means of pipes, mains and conduits, placed at the cost of a private corporation in its public ways, it was equally competent for her to make a valid contract with a private corporation *for supplying by the same means pure and wholesome water for a like use in the same city.*"

In New Jersey *v.* Yard (95 U. S., 114), this court, speaking by the late Justice Miller, said:

"It has become the established law of this court that a legislative enactment in the ordinary form of a statute may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the State, within the protection of the clause referred to of the Federal Constitution.

The case of the Atlantic Water Works Company *v.* Atlantic City (6th Atlantic Rep., 25) is directly in point.

In that case the city charter gave its common council power to provide by ordinance "*for a supply of water by said city.*

In consideration of certain privileges granted by the municipality, and its stipulation to pay a specified sum annually for the use of water in the extinguishment of

fires, the plaintiff covenanted to supply Atlantic City with water. The contract was to continue as long as the company should comply with its obligations, and by one of its clauses the city was empowered to put an end to the contract whenever so minded, by a purchase of the works of the plaintiff. This was held to be a valid contract.

6th Atlantic Rep., 25.

In the case of Bridge Proprietors *v.* The Hoboken Co. (1st Wall., 116–146), this court, speaking by the late Justice Miller, said:

"Without this, they would not have invested their money in building the bridges, which were then much needed, and which could not have been built without some such security for a permanent and sufficient return for the capital so expended; on the faith of this enactment they invested the money necessary to erect the bridges. These acts and provisions on the one side and the other are wanting in no element necessary to constitute a contract."

The above, from Justice Miller, was quoted and approved by Mr. Justice Harlan (in 115 U. S., 625), saying:

"In above case, it was decided that a statute of New Jersey empowering certain commissioners to contract for the building of a bridge over the Hackensack River, and providing not only that the 'said contract should be valid on the parties contracting as well as on the State of New Jersey,' but that it should not be lawful 'for any person or persons whatsoever to erect any other bridge over or across the said river for ninety-nine years,' was a contract whose obligation could not be impaired by a law of the State."

Counsel for appellants cite the Slaughter House cases, the Fertilizing cases, the Freight Rate cases, the Boston

Beer Company case, the Lottery and other cases, heretofore passed upon by this court, but none of these can have any application to the case at bar, and they were all brushed aside as inapplicable to a case of this character, by this court, in the two cases—the case of the Gas Light Company and the Rivers case (115 U. S.). All these cases were cited by counsel in opposition to a doctrine laid down by this court in those cases. They were referred to briefly by Mr. Justice Harlan in his opinion, and dismissed as follows:

"The former adjudications of this court upon which counsel mainly rely, did not declare any different doctrine, or justify the conclusion for which defendants contended."

The court, in the Louisiana Gas Light Company case (115 U. S.), in referring to the Slaughter House cases, said:

"So far from the court saying that the State could not make a valid contract in reference to any matter within the reach of the police power, according to its largest definition, its language was: 'While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power,' we think that in regard to two subjects so embraced, it can not by contract limit the exercise of those powers to the prejudice of the general welfare. They are the public health and the public morals."

It will not do, therefore, in view of the repeated decisions of this court, to say that no valid contract can be made by a State, or by a city representing a State, which in any manner encroaches upon the police power. The

books are full of cases to the contrary, and the settled doctrine of the court, as we understand it, is simply this, that a legislative contract must be held to be *ultra vires* and void, if by its terms there has been a material surrender of the legislative power to protect the State and its people, or the city and its people, in reference to the public health, the public morals and the public safety. Mr. Justice Harlan (in 115 U. S.), after citing many cases of legislative contracts that have been held valid, and which are at the same time in conflict with the police power of the State, said:

"Numerous other cases could be cited as establishing the doctrine that the State may by contract restrict the exercise of some of its most important powers. We particularly refer to those in which it is held that an exemption from taxation for a valuable consideration at the time advanced, or for services to be thereafter performed, constitutes a contract within the meaning of the Constitution."

Counsel for appellants cite the case of Jackson County Horse Railroad Company *v.* Interstate Rapid Transit Railway Company (24 Fed. Rep., 307). But the question there was a very different one from that now before the court. The precise question in that case, as stated by Mr. Justice Brewer, then Circuit Judge, was—"Had the city of Kansas the power to grant for a term of years the *exclusive* right to occupy its streets with street railroads?" This question, the then judge, Brewer, answered in the negative. In that case reference was made to a case previously decided by the Supreme Court of the State of Kansas, Mr. Justice Brewer, then a member of that

court, delivering the opinion. In that case the only question decided was: That because the legislature had granted to the city a general control and supervision of the streets, although the legislature had not in terms made any specific grant in respect to the occupation of streets by railroads or their operation therein, the city might *permit* a street railroad.

The case of the Saginaw Gas Light Company *v.* The City of Saginaw, decided by Mr. Justice Brown, then Circuit Judge, in the United States Circuit Court for the Eastern District of Michigan, September 7, 1886 (28 Fed. Rep., 329), is also cited by counsel for appellants. But the real facts in that case, as well as the principles laid down, scarcely warrant its citation as an authority in this case. In that case, the city charter simply authorized the municipality "*to cause its streets to be lighted.*" This was the *sole* legislative power conferred upon the municipality by the State in reference to that subject. A contract, however, was made by the city, giving the Saginaw Gas Light Company an *exclusive* privilege to light the city *for a period of thirty years.* The court, very properly, held the contract was *ultra vires.*

The case of the City of Brenham *v.* Brenham Water Company (67 Texas, 542: 4 S. W. Rep.), cited by counsel for appellants, can have no controlling influence in this case. The contract in that case was held to be in conflict with a provision of the State Constitution, which reads as follows:

"Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed."

Nor has the rule as laid down in the Spring Valley Water Works *v.* Schattler (110 U. S., 347) any application to the case at bar. All that was decided in that case was that the municipality of San Francisco possessed the legislative power to fix the price of gas and water, unless prohibited by constitutional limitation or a valid contract obligation; the court holding in that case there was no valid contract.

The case of Grand Rapids E. L. & P. Co. *v.* Grand Rapids E. E. & F. G. Co. *et al.*, decided in the Circuit Court, Western District of Michigan, opinion by the late Circuit Judge Jackson (33 Fed. Rep., 659), and cited by counsel for appellants in their brief, page 33, can have no possible application to the case at bar.

In that case a city charter gave the council power "*to make, amend, and repeal*" any ordinance "deemed desirable *for lighting the streets*, and taking charge of them," but did not confer in express terms *exclusive* power over them; it was held that it did not by *implication* give the city control of the streets to the exclusion of the sovereign power of the State, and that an ordinance granting exclusive use of the streets for wires and poles for electric lights for fifteen years was *ultra vires*, and void.

The question decided by the Supreme Court of Oregon in case of Parkhurst *v.* City of Salem (32 Pac. Rep., 304), and cited in brief of counsel for appellants, was that a city, under a grant of exclusive power "*to permit, allow, and regulate*" the laying of tracks for street cars, has not

the power to grant for a term of thirty years the *exclusive* right to occupy its streets with street railroads. The case, therefore, has no bearing on the case at bar, the facts being radically different.

Counsel for appellants cite the case of Gale *v.* Kalamazoo (23 Michigan, 343), opinion by Judge Cooley, and seem to place great reliance on it as supporting their theory in this case. A critical examination, however, will show the facts of the cases to be wholly different. And one sentence in Judge Cooley's opinion shows, conclusively, that had there been in the agreement in that case a stipulation on the part of the city authorizing the city to purchase the market house, which Gale contracted to build, as in the case at bar, the court would not have held the hands of the city were tied, or the contract, therefore, *ultra vires.*

In that case, Gale, the plaintiff, in pursuance of certain charter powers, contracted with the city of Kalamazoo to erect a commodious market house, to be known as the "*Kalamazoo Public Market.*" The same, when completed, was to be placed under the control of the city authorities for the term of ten years. The stalls were to be rented on such terms *as might be agreed on by Gale and the city authorities,* and the rents paid over to Gale quarter-annually. It was stipulated that "during the continuance of this contract there shall be no other public market house in said village, provided said market house shall prove large enough to accommodate the public for the purposes aforesaid." There was no

provision, however, reserving to the city the option of purchasing said market house, or condemning it; there was a stipulation that all marketable products of the city offered for sale should be confined to said market house.

The court held this contract *ultra vires*, as having divested the city of a portion of its legislative powers.

But Judge Cooley, in his opinion, said:

"And had the village, in this instance, contracted to pay the plaintiff for his market building when constructed, or for the rent thereof, the questions before us could not have arisen."

It will be further borne in mind, this case was decided in 1871, more than twenty-seven years ago. Since then, the rulings of this court on this and kindred questions relating to legislative contracts, defining police powers of municipalities, and the extent to which such power may be invaded by legislative contracts, have established the law on lines somewhat different from those recognized by Judge Cooley.

The Town of Westerly Case.

In former brief on part of appellee, the cases of "The Seaman's Friend Society *et al. v.* Town of Westerly," and Seaman's Friend Society *v.* Same, in which Judge Carpenter, then United States District Judge, District of Rhode Island, granted a preliminary injunction, were cited. (See former brief, pp. 60–62.)

Since the preparation of that brief, these cases of Westerly (*supra*) were passed upon in the Circuit Court for the District of Rhode Island, District Judge Brown delivering the opinion. They were tried together as one. The case, as reported in 80 Fed. Rep., 612, is cited by counsel for appellants in their brief, page 36.

From a careful examination of the opinion in this case, it will be seen, the case as there finally decided, so far from sustaining the contention of counsel for appellants upon any of the points involved in this case, is just the reverse.

In that case the complainant based its claim of right to preclude the town of Westerly from constructing water works—

First. Upon a vote by the *town council* under a certain section 32, chapter 425, of the Public Laws of the State of Rhode Island, conferring certain powers, not upon the "*town*," but upon the "*town council.*"

Second. Upon certain alleged acts of the town, under a certain other act, chapter 285 of the Public Laws of the State of Rhode Island, conferring certain powers on "*towns*," which it was claimed had the effect of *adopting* and *ratifying* the act of the "*town council.*"

The section of the chapter 425, under which complainant claimed an exclusive right, is as follows:

"*Section 32.* The '*town council*' of any town, or the city council of any city, may grant to any person or corporation the right to lay water pipers in any of the public highways of such town or city for the supplying the

inhabitants of such town or city with water, and may consent to the erection, construction and the right to maintain a reservoir or reservoirs within said town or city, for such time and upon such terms and conditions as they may deem proper, including therein the power and authority to exempt such pipes and reservoirs, and the lands and works connected therewith from taxation."

The court held that under this grant of power the "*town council*" had no power to grant to the Westerly Water Works Company any *exclusive rights;* and further, the court found as a fact (I quote from the opinion), that there "*is no express agreement,*" as in the case at bar, "*that the town will not compete, nor that in case it should elect to compete, it would purchase the works.*"

The Westerly Water Works Company *v.* The Town of Westerly, 80 Fed. Rep., page 617.

The provision of chapter 285 of the Public Laws of Rhode Island, conferring certain powers upon the "*towns*" of that State, as contradistinguished from power conferred on the "*town councils,*" and under the former of which it was claimed there had been by certain votes and acquiescence, an *approval* and *ratification* of the grant made to the complainant by the "*town council,*" reads as follows:

"*Section 1.* Whenever the electors of any town, qualified to vote upon questions of taxation, or involving the expenditure of money, shall have voted, at a town meeting called for that purpose, to provide a water supply for the inhabitants of such town, or for some part thereof; or whenever any town shall enter or shall have entered into any contract with any person or corporation to furnish such town with such a water supply (a contract

which towns are hereby authorized to make), then such town, or the person or corporation bound to fulfill such contract, as the case may be, may take, condemn, hold, use, and permanently appropriate any land, water, rights of water and of way necessary and proper to be used in furnishing or enlarging any such water supply, including sites and materials for dams, reservoirs, pumping stations, and for coal houses, with right of way thereto, and right of way for water pipes along and across public highways and through private lands, and including also lands covered or to be flowed by water, or to be in any other way used in furnishing, enlarging, or maintaining any such water supply."

The court held, however, there had been no ratification of the grant made by the "*town council*," by any acquiescence or acts of the "*town of Westerly*," under this chapter 285. And while not deciding the question as to whether under this chapter 285 a "*town*" has *power to preclude itself by contract from competing with the company holding the right to construct such works*, it is clearly apparent from the opinion of the court, taken as a whole, that the court would have held such power existed had it been necessary to pass upon that question in that case.

And, at the risk of being tedious, I beg to quote upon this point the following, from the opinion of the court, as rendered by Brown, District Judge, in that case:

"An important difference exists between this statute (ch. 285) and chapter 425, previously considered. The town is authorized by this statute *to contract with any person or corporation for a water supply* 'for the inhabitants of such town, or for some part thereof.' This is obviously a *different power* from that of the town council, under chapter 425, to grant permission to lay pipes and to vend water, subject to indefinite competition."

The court proceeding, after referring to a doubt expressed by his predecessor, Judge Carpenter, as to whether any *exclusive* privilege could be granted under this chapter 285, says:

"Although such doubt exists, we think there is great force and weight of reason in the contention of the plaintiffs, that chapter 285 *does confer upon the town the power to make a binding agreement with the company for a full supply of water for the town and its inhabitants, and, as a part of such contract, to give to the company, as reasonable security for compensation for its original outlay, an agreement that the town will not, during the period of twenty-five years, compete with the company so long as it furnishes a proper and adequate supply of water of a suitable quality, where such an agreement is accompanied by an agreement upon the part of the company that it will sell to the town its property at a fair price, to be fixed by arbitration.* The reasonableness of such a contract might, however, be questioned, if the town were called upon to pay a sum to compensate the company for the loss of an *exclusive* franchise in addition to the value of its works. To bind the town to pay the company the value of an exclusive franchise might be said to amount to conferring an *exclusive* franchise. By retaining the right to recall the powers granted to the company upon repayment to it of the amount of its investment" (this, the court will perceive, was the precise thing that was stipulated for in the contract now under consideration), "the objection that the hands of the public are tied, and that its discretionary powers as to making further improvements are impaired, is obviated, at least to a great extent. The contract, then, can not, in strictness, be called an exclusive contract, since the exclusiveness is only upon a reasonable condition. *We think, therefore, that a sound distinction can be made between a grant or a contract which absolutely excludes all competition, and one which merely excludes the competition of the town until it shall make due compensation to the company.* And there is authority for such a distinction in

the cases cited for the complainants: Walla Walla Water Company *v.* The City of Walla Walla, 60 Fed. Rep., 957; Fergus Falls Water Company *v.* Fergus Falls, 65 Fed. Rep., 586; Illinois Trust and Savings Bank *v.* City of Arkansas City, 22 C. C. A., 171: 76 Fed. Rep., 271."

The court, proceeding further in the case of the Westerly Water Works Company (*supra*), refers specifically to this very case of the Walla Walla Water Company *v.* The City of Walla Walla and to the decision made in the Circuit Court, and points out very clearly the distinction between the contract in the case at bar and the one in the case of the town of Westerly, as follows:

"It appears, however, upon examination of the case of The Walla Walla Company *v.* The City of Walla Walla (60 Fed. Rep., 957), that the city *in explicit terms agreed not to erect, maintain or become interested in any other water works, save under conditions not material to this decision, and it is also stated that the city had bound itself to take over the plant and render just compensation whenever it did elect to furnish water by means of works owned by it.* In the present case there is *no express agreement* that the town will not compete, nor that in case it should elect to compete it will purchase the works. Such agreement must be deduced from construction, and in view of the rule that all doubt in the construction must be resolved against the company and in favor of the public, there is great difficulty in inferring such agreement."

Westerly Water Works Company *v.* Town of Westerly, 80 Fed. Rep., 611.

The cases of Westerly Water Works *v.* Town of Westerly and Seaman's Friend Society *v.* Town of Westerly were decided first by United States District Judge Carpenter, then District Judge in the Circuit Court of the

District of Rhode Island, June 30, 1896, in which he fully sustained the views for which we are now contending. Judge Carpenter concluded his elaborate opinion in the case as follows:

"On the whole, the enterprise in which the town of Westerly has embarked seems to me to be no less a project, without any plausible excuse, to confiscate the property of these complainants, and the argument of the town on these motions seems to me to be an attempt to show that this project can be carried to completion under the forms of law. To such an argument I am not inclined to give any greater weight than that to which it is entitled under pointed rules of law and pointed rules of decision. The injunction will issue in both cases."

75 Fed. Rep., 193.

Appellant's Counsel's Summary of objections to contract.

Counsel for appellants summarize in their brief (pages 24–25) four objections to the validity of the contract with the Water Company, as follows:

(1) "The contract creates a monopoly, which in the absence of an express grant from the legislature of power so to do, or such power necessarily implied, is void, as in contravention of public policy.

(2) The contract is void as an attempt to contract away a part of the governmental power of the city council.

(3) The contract is void as creating an indebtedness in excess of the charter limit.

(4) The contract is in violation of the express provisions of a general statute of the Territory of Washington."

These objections will be considered, briefly, in their order.

I.

Does the contract create a monopoly?

This is fully answered in the negative in former brief of appellee (pages 33–24), and authorities there quoted.

New Orleans Gas Company *v.* Louisiana Light Company, 115 U. S, 650;

New Orleans Water Works Company *v.* Rivers, 115 U. S. 674;

Louisville Gas Company *v.* Citizens' Gas Company, 115 U. S., 683;

Crescent City Gas Light Company *v.* New Orleans Gas Light Company, 27 La. Ann., 138;

The State, *ex rel*, etc., *v.* The Cincinnati Gas Light and Coke Company, 18 Ohio, St. Rep., 291.

See, also, *supra*, this brief.

II.

Is the contract void, as an attempt to contract away a part of the governmental power of the city council?

This contention was anticipated and fully met in former brief (pages 40–43); also pages 46, 47, and authorities there cited.

See, also, pages *supra* of present brief.

III.

Is the contract void, as creating an indebtedness in excess of the charter limit?

This contention was also fully met and answered in the former brief (pages 65–106). Counsel evidently lacks confidence in this objection, judging from the slight attention it receives in their brief.

But, since writing the former brief, I have discovered that this question has been settled for this court by a decision of the Supreme Court of the State of Washington, as will be seen by the following extract from the opinion of Judge Hanford, in the case of Moore *v.* The City of Walla Walla (60 Fed. Rep., 962, *supra*).

In that case, Judge Hanford, among other things, said:

"The other grounds relied upon, to which no allusion is made in my opinion in the preceding case, are also insufficient. The point made, that the limitation upon the power of the city to incur a debt, contained in the 105th section of its charter, has not been repealed by the general laws of this State, fixing a different and more liberal measure, has been passed upon by the Supreme Court of this State, in the case of Yesler *v.* City of Seattle (1st Washington St. Rep., 308; 25 Pac. Rep., 1014). That decision bears directly on the point, holding that the general laws of the State, fixing the limitation of indebtedness which may be incurred by municipalities, apply to cities holding charters granted by special acts of the territorial legislature, as well as to cities incorporated under the general laws of the State."

IV.

Is the contract in violation of the express provisions of any general statute of the Territory of Washington?

This is a point suggested here for the first time. Nothing of the kind was intimated in the court below. The labors of the present counsel, in their tremendous effort to find some instrument with which they can successfully assail the contract with the water company, have resulted in the discovery of this very obscure point.

The proposition is: That the general act of 1881, entitled "An act authorizing cities, incorporated towns, and villages to provide for the supply of water" (Session Laws of the Territory of Washington, 1881, p. 24), was not repealed, if indeed it ever became a valid act, as to the city of Walla Walla, by the special act entitled, "*An act to incorporate the city of Walla Walla, and to particularly define the powers thereof*," approved November 28, 1883, and which went into effect January 1, 1884, and under which the contract in question here was made, but that the same must stand, be read into, and become a part of it.

Such a proposition, it is confidently submitted, would be a reversal of the plainest and well-settled principles of statutory construction.

It is conceded by counsel that the true rule is that legislation, as to a *special subject or locality*, supersedes prior *general legislation*. But it is contended that this

rule only obtains where the special act covers everything in the general act. Applying this rule, even with its qualification, as stated by counsel, which by the way is quite too broad, it is clear the act of 1881, and all its provisions, in so far as they apply to the city of Walla Walla, were repealed by the special act of November 28, 1883.

Counsel admit "if the special charter covered any one of the many details of the general act of 1881, then it might be contended that as to that point the general act was repealed," and yet an inspection of the special charter of 1883 will disclose the fact that it covers substantially nearly every one of the details, in regard to providing a water supply for the city, found in the general act of 1881.

But it is clear, not only from the several provisions of the two acts, but also from the title of the special act of 1883, and also the repeal clause in that act, that it was the intention of the legislature to first *define* in that special act *all the powers which the city should be permitted to exercise*, and to *repeal all acts or parts of acts conferring any powers*, or having any reference whatever to the city of Walla Walla.

The title of the special act of 1863 is not only "to incorporate the city of Walla Walla," but also "*to particularly define the powers thereof*," while section 106 of the special act of 1883 has the following repealing clause:

"*Sec. 106.* All acts and parts of acts relating to the incorporation of Walla Walla City, and not herein reserved, are hereby repealed."

A reference, moreover, to section 103 of the charter (act of November 28, 1883) declares affirmatively that "the *powers* * * of the city of Walla Walla * * *shall be those prescribed in this act.*"

The section reads—

"The rights, powers and duties, and liabilities of the city of Walla Walla, and of its several officers, *shall be those prescribed in this act*, and this act is hereby declared a *public act.*"

Surely, in view of these several provisions, it can not be successfully claimed that the city, or its officers, can exercise any *other* powers than those granted, express or implied, by this act of 1883.

The old maxim, *expressio unius exclusio alterius*, is applicable here.

It is, furthermore, a matter of very grave doubt whether this general act of 1881 ever became operative. Section 8 of the act provides as follows:

"This act, when approved by the Governor of this Territory, shall be in force upon its *approval or ratification by the Congress of the United States.*"

It is conceded by counsel for appellants, in their brief, that this act never was either approved or ratified by any *affirmative* action by The Congress of the United States.

Injunction is the appropriate remedy.

Counsel for appellants make claim in their brief that conceding the acts which are complained of are well pleaded and are sufficient to come within the constitu-

tional provision, still the court is without jurisdiction as to *subject-matter*. In other words, the claim is made that it is not such a case as a court of equity will take cognizance of.

It is not believed, in view of the facts disclosed in this case, that this court will hesitate in promptly holding, provided the contract with the Water Company is held to be valid, that the remedy by injunction to restrain the execution of the unconstitutional act of the city is the only complete remedy. There is not, nor can there be, any complete remedy at law for such a ruthless and unjustifiable invasion of the constitutional rights of the appellee, which, unless restrained, will result in *changing the terms of the contract*, and thus *impair its obligations*, but also in a virtual annihilation of all vested values of their property. (See former brief, pages 53–57.)

The acts of the city operate clearly to impair the obligations of appellee's contract.

Counsel for appellants, in their elaborate brief (page 23), *querie* that there is no sufficient averment in the pleadings to show any impairment of the obligation of the contract. A careful examination both of the complaint and answer will set at rest this *querie*. The complaint (Record, 10–13) avers:

First. The passage by the city in due form of an ordinance making full provision for the erection of extensive water works, authorizing and directing for such purpose the issue by the city of bonds to the amount of

$160,000, and directing their sale "upon the most advantageous terms," no other limit, and the proceeds paid into the city treasury to the credit of a fund to be known as the "City Water Fund." This ordinance further provides for the levy of a tax upon the taxable property of the city sufficient to pay the interest on such bonds. The ordinance further provides for a sinking fund to meet the principal of the bonds at maturity. It further provides for a special election to ratify the same, as provided by the charter act approved February 10, 1893. It provides, further, this ordinance should take effect immediately on its being published in the official paper for five days consecutively. (Record, 10–13.)

The complaint further shows such special election was held, and the issue of the bonds and the erection of the water works authorized by the necessary vote. The complaint further avers that the city and its officers claim and insist that the complainant's contract with the city is not a valid or binding contract, "neither in respect to stipulation binding the city not to erect, maintain or be interested in any system of water works, other than those of plaintiff, nor in respect to the stipulation for the furnishing of water to the city by this plaintiff and the compensation to be paid therefor; and said city and said officers refuse to be bound by said contract or to observe the same." (Record, 13.)

The complaint further avers, distinctly, that the said city, regardless of the rights of complainant under said contract, "are proceeding to borrow money to erect and

maintain water works, as in and by the ordinance last above set out provided, and have advertised the municipal bonds of the said city to the amount of $160,000 for sale on the 30th day of January, 1894, for the purpose of erecting and maintaining said water works, and threaten, and will on said day, unless restrained by this honorable court, sell said bonds and apply the proceeds to the erection of water works for supplying of the inhabitants and consumers of the city with water for reward and compensation, and will become a competitor with plaintiff for the trade or custom of said inhabitants or consumers." (Record, 13.)

The complaint further avers that the said city of Walla Walla "is now, and for some time last past has been, expending large sums of money for a water supply, and for the improvement of the same, and for preliminary work in connection with its proposed system of water works, and is continuing to make such expenditures, and will continue to do so, and threatens to and will commence erection of said system of water works at a large expense, if it shall sell its bonds for said purpose, and threatens to and will prosecute said work to a completion, and will become a competitor with plaintiff for the trade and custom of the consumers of water in the city of Walla Walla, as soon as said work shall have been completed." (Record, 13–14.)

The complaint further avers "that the value of its property is largely dependent upon the fact of its having no competition in the city of Walla Walla, and particularly no competition *from* the city of Walla Walla, *and*

on the fact of its contract right to be free from competition by the city of Walla Walla during the life of its contract." (Record, 13–14.)

Various other averments of like character, showing the manner in which the obligations of plaintiff's contract will be impaired, unless the city is restrained, will be found in the complaint. (Record 14–16.)

The answer of the city first assails the validity of the contract with the Water Company, and denounces it as *ultra vires*. The answer admits, not only by the failure to deny, but by *affirmative declaration*, every one of these averments in the complaint. (Record, 20–27.) Especially does it state that it refuses to be bound by its agreement to not erect water works of its own. (Record, 25.)

Any act which varies the terms of a contract without the consent of all parties to it, or which destroys rights vested under and in pursuance of the terms of a contract, impairs the obligation of such contract.

B. & P. R. R. Co. *v.* Nesbitt *et al.*, 10 How., 390.

It is one of the obligations of the contract that the city will not erect water works, or become interested in any, except upon certain important conditions, namely, the purchase of the company's works; and now the city ignores all these conditions, thus breaking faith with the company, impairing the obligations of the contract, and rendering the water company's property in the contract, as also the plant—which is the result of large investments—under this contract worthless.

On this question see former brief on part of appellee, pages 55–57; also pages 62, 63, and authorities there cited.

It is quite true, as stated by this court in Curtis *v.* Whitney (13 Wall., 68): "Nor does every statute which affects the value of a contract impair its obligation;" but it is equally true when the value of a contract is affected injuriously by reason of the fact that the *terms of the contract* have been changed without consent, then there is such an impairment of the obligation of the contract as is contemplated by the use of that phrase in the Constitution.

The Ordinance passed by the city June 20, 1893, is valid, and was authorized by the act approved July 10, 1893. The facts are properly averred in complaint.

Counsel for appellants say in their brief (page 14), that there is no sufficient averment in the pleadings to show that the city of Walla Walla had the power, under any authority from the State, to enact the ordinance approved June 20, 1893, providing for the issue of bonds and erection of water works.

While conceding the correctness of the rule, as stated by counsel, that it must appear from the pleadings that this power existed, it is respectfully insisted this does appear *affirmatively* and *positively*, both in complaint and answer. In the complaint the ordinance is set out in *hæc verba*, and the *public act* of the legislature *confer-*

ring authority is referred to in the ordinance, *both by title fully expressed* and *date of approval*, as follows:

"The city of Walla Walla does ordain as follows:

"Whereas, the city council of said city of Walla Walla deem it advisable that the said city shall exercise the authority conferred upon them in relation to water works, *under and by virtue of an act of the legislature of the State of Washington, entitled, 'an act relating to and authorizing cities and towns to purchase, construct and maintain water works, systems of sewerage, gas and electric light plants, and to issue bonds to pay therefor, and declaring an emergency, approved February 10, 1893:*

"Now, therefore, the city of Walla Walla does ordain as follows."

Then follows the ordinance at length. (Record, 10–13.)

The answer (Record, 24) says:

"We admit that the city of Walla Walla, on the 20th day of June, 1893, passed, and that on the same day the mayor of said city approved, the ordinance set forth in complainants' bill of complaint."

This, it will be observed, is not a *private* but a *public* act, an act, therefore, all the provisions of which the court below, as well as this court, will take judicial knowledge of. (Session Laws, Legislature of the State of Washington, 1893, pp. 12–14.)

By a reference to the act of February 10, 1893 (Session Laws of Washington, 1893, pp. 12–14), under which the ordinance was passed by Walla Walla City authorizing the issuance of bonds and the erection of water works, in section one, it will be seen, the city of Walla Walla has full power, clearly expressed, to do everything the city did do under it, by the passage of the ordinance of

date June 20, 1893 (Record, 10), and, further, that in all respects such ordinance conforms to the requirements of said statute. (Record, 10–13.)

It is respectfully submitted, as both title and date of approval of act (coupled with the fact that it is a public act of the legislature) were set out in the bill of complaint, the averment as to the power of the city to pass the ordinance was all that was required. The facts as pleaded are the equivalent in all respects as a pleading to one in which the act of the legislature is set out at length, while the former is much the better form.

The ordinance of ~~March 19, 1887~~ June 20th 1893, is a law of the State within the meaning of the Constitutional clause that no State shall pass any law impairing the obligation of contracts.

In support of this proposition, see former brief (pp. 49–53), also the following:

In New Orleans Water Works *v.* Louisiana Sugar Company (125 U. S., 31), this court, opinion by Mr. Justice Gray, said:

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may be properly considered as a law within the meaning of this article of the Constitution of the United States."

Estoppel.

In addition to other matters of estoppel hereinbefore referred to in this, and also in former brief, it should be borne in mind the city of Walla Walla availed itself of the benefits of its contract with the Water Company from March 19, 1887, until June 20, 1893, a period of six years and three months; and, so far as the record shows, during all that time made no complaint, therefore, while ordinarily no amount of ratification or acquiescence can make an *ultra vires* contract valid, the city should not now be permitted to repudiate its contract. As between the city and the Water Company, it should be regarded and treated—whatever might have been the lack of power in the first instance—as a contract so far consummated and recognized by the city, *by the receipt of benefits under it for so long a period of years*, that the city is now *estopped* from denying its validity, or impairing its obligation. And it follows in this view of the case, the obligations of the contract are equally within the protection of the Constitution of the United States, as though the power to make the contract was unquestioned.

Bearing on this view of the case, the case of Fergus Falls Water Company *v.* City of Fergus Falls, in the Circuit Court for the District of Minnesota, Nelson, District Judge (65 Fed. Rep., 586), is directly in point.

In that case, under a charter with powers more restricted than are those of the Walla Walla charter, the city of Fergus Falls contracted with the assignor of the

plaintiff, giving him and his assignee exclusive privilege of laying water mains in the city for thirty years, and providing that he should furnish the city with fifty-five fire hydrants, at a rent annually of $80 each, for the thirty years, with a stipulation that at the end of ten years the city might, at its option, buy the water works, and also stipulating that no similar privilege should be granted to any other person, firm, or corporation, and further, that the city would not, during this period of thirty years, erect water works of its own. The water works were erected under this contract and operated for ten years, when the city passed an ordinance declaring the contract null and void.

In a suit to recover rent of hydrants, as per terms of contract, Judge Nelson said:

"The only question is, is this ordinance so unreasonable so oppressive, so contrary to public policy, that the law will interfere and declare it void? I am of the opinion that if this question had been raised at the outset, it is doubtful whether the city council had authority to give an exclusive contract of this character to any person for the purpose stated; but as plantiff's assignor, relying upon the ordinance, in good faith invested a large sum of money in these works, and the city has for ten years enjoyed the benefits thereof, without objection or complaint, and has now the opportunity of purchasing the works at a reasonable valuation, I do not consider that the ordinance is so unreasonable, oppressive, or contrary to public policy as to be void. Where a contract is sought to be avoided on the grounds above stated, it must be treated as a nullity by the party seeking to avoid it, and must be repudiated in toto. He can not repudiate it and at the same time reap any of the benefits derived from it, as the defendant has attempted to do."

Fergus Falls Water Company *v.* Fergus Falls City, 65 Fed. Rep., 591.

Counsel in their brief (page 23) say:

"*It will be observed that no denial or refusal of the annual rent of $1,500 has ever been made.*"

How this is I am unable to say, as the record in that regard is silent. But assuming the fact to be as suggested by counsel, then we have the remarkable and still more aggravated case of the city *repudiating* the contract *in part*, and *recognizing* it as *valid in part; denouncing* it as *ultra vires*, in so far as by its express terms the city is inhibited from becoming a competitor, and embracing and *recognizing* it as *valid* in so far as the company is compelled to furnish the city with water for the sum specified in the contract for the nineteen years of the contract term that remained when the obligation of the contract was assailed, and for the fourteen years now unexpired.

In other words, if this suggestion of counsel is true, then the city is attempting to break down the barriers in its contract so as to enable it to compete with the water company in furnishing the *inhabitants* of the city with water, and at the same time holding on to the contract compelling the water company to furnish the *city* with water for the mere pittance of $1,500 per annum specified in the contract.

Is it not apparent to all that the water company would never have covenanted to furnish *the city* with water for twenty-five years, for such a nominal sum, had it not been for the covenant of the city that it would not become a competitor in furnishing the *inhabitants* of the city with water?

Whatever view is taken of this case—from whatever standpoint the action of the city is considered—it is presented in a most unenviable light. Were an individual, a natural person, to treat the obligations of his solemn written contract in a manner such as this city has treated its contract obligations, he would be universally denounced as destitute of moral responsibility. The act, however, is no less reprehensible because done by a municipal corporation.

It is respectfully insisted the decree of the court below should be affirmed.

JOHN H. MITCHELL,
Solicitor for Appellee.